No. 91-511

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DOW CHEMICAL, USA,
Petitioner,

v.

MR. & MRS. JESSE PINION,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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Dated: September 24, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Did the court of appeals err under *Wolfsohn* v. *Hankin*, 376 U.S. 203 (1964), when it dismissed petitioner's appeal despite reasonable good faith reliance on orders and assurances by the district court that lulled petitioner into filing a technically untimely notice of appeal?

LIST OF PARTIES

Dow Chemical, U.S.A., is an operating unit of The Dow Chemical Company. The following companies are less than wholly owned subsidiaries, and affiliates of The Dow Chemical Company:

Aardvark Limited
Ace Limited
Advanced Micro Devices, Inc.
Agri-Chem, Inc.
Agro Quimica Maringa S.A.
Agron Inc.
Aguas Industriales de Tarragona S.A.
Airco Generon Systems LP
Alamo Land Company, Inc.
Anticorrosivos Industriales Limitada
Arabian Chemical Company Limited
ASIPLA (Asociacion Gremial de Industriales del Plastico de Chile)
AVR Chemie B.V.
AVR Chemie CV
Badger Limited
Bank Mendes Gans N.V.
Bear Mountain CoGen, Inc.
Biochimica Del Salento S.p.A.
Bioresin Developments Ltd.
Blue Ridge Laboratories, Inc.
Borsele Hydrocracker B.V.
Brea Canyon CoGen, Inc.
BCC CoGen, Inc.
Canary Moving Limited
Carleton Shipping and Leasing Corporation
Carleton Shipping and Leasing Limited
Cetus Corporation
Chalhoub-Pharmaceuticals Cha-Pha S.A.L.
Chalk Cliff CoGen, Inc.
Chimtrade
Clean Bay
Coalition Technologies, Ltd.
Collaborative Research, Inc.

Columbia Scientific Industries Corporation
Compagnie des Services Dowell Schlumberger S.A.
Conklin IPP, Inc.
Corona Energy Corporation
CoGen Admin Services, Inc.
CoGen Kern Bluff, Inc.
CoGen Lime Rock
CoGen Lynchburg, Inc.
CoGen Lyondell, Inc.
CoGen Poso Creek, Inc.
CoGen Power, Inc.
CoGen Terrace Bay, Inc.
Cranley Corporation Limited
Cromarty Petroleum Company Limited
CC CoGen, Inc.
CEC Prime, Inc.
CIA, Peruana De Telefonos S.A.
Dartigue Limited
Destec Sterling, Inc.
Destec Energy, Inc.
Destec Engineering, Inc.
Destec Fuel Resources, Inc.
Destec Holdings, Inc.
Destec Operating Company
Destec Ventures, Inc.
Devonshire Underwriters Limited
Dexco Polymers
Dionex Corporation
Dixie Union (UK) Ltd.
Dixie-Union Ltd.
Dixie-Union S.A.
Dixie-Union SARL
Dixie-Union Verpackungen Gmbh
Dolco Packaging Corp.
Donichem Chemical KFT
Double "C" CoGen, Inc.
Dow Chemical Iberica S.A.
Dow Corning (Korea) Ltd.

Dow Corning (Thailand) Ltd.
Dow Corning (UK) Management Ltd.
Dow Corning de Argentina S.A.I.C.
Dow Corning de Colombia, S.A. (Siliconas de Colombia Limitada)
Dow Corning de Mexico S.A. de C.V.
Dow Corning de Venezuela S.A.
Dow Corning de Brasil Ltda.
Dow Corning Africa Silicones Inc.
Dow Corning Australia Pty. Ltd.
Dow Corning Canada, Inc.
Dow Corning Construction S.A.
Dow Corning Coordination Center S.A.
Dow Corning Corporation
Dow Corning Enterprises, Inc.
Dow Corning Foreign Sales Corporation, Inc.
Dow Corning Foundation
Dow Corning France S.A.
Dow Corning GmbH
Dow Corning GmbH (Austria)
Dow Corning Hansil Limited
Dow Corning Hong Kong Limited
Dow Corning Iberica S.A.
Dow Corning International Sales Corporation
Dow Corning Investment S.A.
Dow Corning Japan Ltd.
Dow Corning KK
Dow Corning Limited
Dow Corning New Zealand Ltd.
Dow Corning Opthamalmics, Inc.
Dow Corning S.p.A.
Dow Corning S.A.
Dow Corning Silicon Energy Systems, Inc.
Dow Corning STI Limited
Dow Corning STI, Inc.
Dow Corning Taiwan, Inc.
Dow Corning Toray Silicone Co., Ltd.
Dow Corning Wright Corporation

Dow Kakoh Kabushiki Kaisha
Dow Mitsubishi Kasei Limited
Dow-United Technologies Composite Products Inc.
Dowell Schlumberger (Asia) Limited
Dowell Schlumberger (Eastern), Inc.
Dowell Schlumberger (Far East), Inc.
Dowell Schlumberger (Malaysia) Sdn. Bhd.
Dowell Schlumberger (Middle East), Inc.
Dowell Schlumberger (Nigeria) Limited
Dowell Schlumberger (Western) S.A.
Dowell Schlumberger de Chile Limitada
Dowell Schlumberger de Mexico S.A. de C.V.
Dowell Schlumberger de Venezuela, S.A.
Dowell Schlumberger de Brasil Servicos Petroliferos Ltda.
Dowell Schlumberger Argentina Sociedad Anonima de Mineria
Dowell Schlumberger Canada Inc.
Dowell Schlumberger China, Inc.
Dowell Schlumberger Corporation
Dowell Schlumberger Inc.
Dowell Schlumberger International, Inc.
Dowell Schlumberger Italia S.A.
Dowell Schlumberger Participation
Dowell Schlumberger Peru, S.A.
Dowell Schlumberger Saudi Arabia Ltd.
Dowell Schlumberger Statistics Limited
DowElanco
DowElanco (Malaysia) Sdh Bhd
DowElanco (NZ) Limited
DowElanco (Singapore) Pte. Ltd.
DowElanco (Thailand) Limited
DowElanco de Colombia S.A.
DowElanco Argentina S.A.
DowElanco Australia Limited
DowElanco B.V.
DowElanco Canada Inc.
DowElanco Chile S.A.

DowElanco China Ltd.
DowElanco Denmark A/S
DowElanco Export S.A.
DowElanco GmbH
DowElanco Iberica S.A.
DowElanco Industrial Ltda.
DowElanco International Ltd.
DowElanco Italia S.r.L.
DowElanco Japan Limited
DowElanco Limited
DowElanco Mexicana, S. A. de C. V.
DowElanco Pacific Limited
DowElanco Pflanzenschutzmittel Vertriebsg.m.b.H.
DowElanco S.A.
DowElanco Sverige AB
DowElanco Taiwan Ltd.
DowElanco Tarim A.S.
DowElanco Venezuela, C.A.
Drilling Services S.A.
DC STI S.A.
DCS Capital Corporation
DCS Capital Partnership
DCU/LB Trust
DH Compounding Company
DS Technical Services, Inc.
Eagle Flying Limited
El Dorado Terminals Company
Elanco Ihara K.K.
Epoxital S.R.L.
Estireno del Zulia, C.A.
Etoxilados del Plata S.A.
Etudes Et Fabrication Dowell Schlumberger
Eurosemences, S.A.
Exel Limited
Expansao Corretora de Seguroz Ltda. S/C
EDN—Estireno do Nordeste S.A.
Family Comercio e Industria de Produtos de Limpeza Ltda.

First Chemical Factoring SpA
Flura Corporation
Fort Saskatchewan Ethylene Storage Corporation
Fort Saskatchewan Ethylene Storage Limited Partnership
Fuji Polymer Industries Co., Ltd.
Generon Systems
Generon Systems A.G.
Genetics Institute Inc. (GENI)
Gestion de Capital Riesgo del Pais Vasco S.A.
Gruppo Lepetit S.p.A.
Gruppo Lepetit Trading SRL
Gurit Essex AG
GIE Euromais
H-D Tech Inc.
Haeser & Kaessner de Brasil Produtos Quimicos Ltda.
Hammer Pharma S.p.A.
Hartel Diensten B.V.
Hemlock Semiconductor Corp.
HEP CoGen, Inc.
I.N.C.S.I., S.A.
Ibachem (Ibafon Chemicals) Limited
Indian Hills Development Corp. of Carroll County
Industrial Training Systems Corporation
International Chemical and Mining Corporation
International Oilfield Contractors, Inc.
ICAP—Industria Chemica S.R.L.
IGENE Biotechnology, Inc.
J.C.P. Laboratories, Inc.
Joilet Marine Terminal Trust Estate
Kern Front CoGen, Inc.
Kukje Pharmaceutical Industrial Company Ltd.
Laboratories Pharmaceutiques Biotic Maroc S.A.R.L.
Lakeside Laboratories, Inc.
Louisiana Gasification Technology, Inc.
Lucky Epoxy Limited
Lucky Epoxy Resin Ltd. (PENDING)

Lucky-DC Silicone Co., Ltd.
Maasvlakte Oil Terminal C.V.
Maasvlakte Oil Terminal N.V.
Magma Power Company
Marion & Company
Marion Merrell Dow (Europe) A.G.
Marion Merrell Dow (N.Z.) Limited
Marion Merrell Dow Australia Pty. Limited
Marion Merrell Dow Inc.
Marion Merrell Dow K.K.
Marion Merrell Dow S.A.
Marisub II, Inc.
Marisub, Inc.
Merrell Dow Belgium S.A.
Merrell Dow Espana S.A.
Merrell Dow France et Cie (SNC)
Merrell Dow Funal K.K.
Merrell Dow Manufacturing Limited
Merrell Dow Pharma GmbH
Merrell Dow Pharmaceuticals (Canada) Inc.
Merrell Dow Pharmaceuticals Inc.
Merrell Dow Pharmaceuticals International Inc.
Merrell Dow Pharmaceuticals Pacific Limited
Merrell Dow Portuguesa Sociedade Quimica, S.A.
Merrell Puerto Rico, Inc.
Microsoft Corporation
MDP (Holdings) Limited
N.V. Dow Corning S.A.
Neoprobe Corporation
Niedersachsische Gesellschaft zur Endableagerung
von Son derabfal GmbH
Nordic Laboratories Inc. (PENDING)
Northway CoGen, Inc.
NBW Industria E. Commercio Limitada
NKY Distribution Center Inc.
NPC Services, Inc.
Oasis Pipeline Company
Oilfield International Equipment and Supplies, Inc.

Oilfield International Equipment and Supplies, Pte. Ltd.
Oyster Creek CoGen, Inc.
OCG CoGen, Inc.
P.T. Dowell Schlumberger Indonesia
P.T. Pacific Chemicals Indonesia
P.T. Pacific Indomas Plastic Indonesia
Pacific Chemicals Berhad
Pacific Plastics (Thailand) Limited
Perennator GmbH
Petroquimica-Dow S.A. (Petrodow)
Polykem S.A.
Polylactane Incorporated
Promix System
Prosperity IPP, Inc.
Prosperity Limited Partnerhisp
Pumping Services of Iran Private Joint Stock Company
Pumptech N.V.
PACLAN FB Haushaltsartikel Vertriebs GmbH
Recon Associates, Inc.
Rio Grande CoGen, Inc.
S.A. Interentreptise Les Bouillides
San Joaquin CoGen, Inc.
Scotdril Offshore Company
Services Conseils Dowell Schlumberger S.A.
Services Dowell Schlumberger S.A.
Shape, Inc. (PENDING)
Siam Styrene Monomer Company Limited
Siam Synthetic Latex Company Limited
Sierra CoGen, Inc.
Silcover SpA
Siliconas de Chile Limitada
Siliconas Del Peru S.A.
Silinor S.A.
Siltech Limited
Site Services, Inc.
Stony Brook CoGen, Inc.

Store Heat and Produce Energy, Inc.
Suministradora de Productos Quimicos, S.A.
Sumitomo Naugatuck Co., Ltd.
SD Group Service Company Limited
SDC Coatings, Inc.
SJC CoGen, Inc.
Tanabe-Marion Laboratories (PENDING)
Technical Consultants, Inc.
The Cynara Company
The Edgar Lomax Company
Thixomat, Inc.
Total Opsiag en Pijpleiding Nederland N.V.
Tower Assurance Company Limited
Transformadora De Etileno S.A.
TOTAL Raffinaderij Nederland N.V.
Ulsan Pacific Chemical Corporation
United AgriSeeds, Inc.
Univar Corporation
Vorakim Kimya Sanayi Ve Ticaret Anonim Sirketi
Wabiskaw Explorations Ltd.
Wickhen Products of Delaware, Inc.
Wickhen Products Inc.
Wm. H. Muller S.A.—Minerios, Comercio e Navegacao
X. L. Insurance Company, Ltd.
Zhejiang Pacific Chemical Corporation
Zoo-Agro de Venezuela, C.A.

All other parties in this matter are set forth in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Dow Chemical, USA, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on April 19, 1991.

OPINIONS BELOW

The opinion of the court of appeals is reported at 928 F.2d 1522, and is reprinted in the Appendix at pages 1a-32a.

JURISDICTION

The decision of the court of appeals was issued on April 19, 1991. A petition for rehearing and suggestion for rehearing en banc was denied on June 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case involves a property damage action brought by Respondents for alleged damages to their farm in Dalton, Georgia claimed to be caused by contaminated groundwater from a nearby Dow Chemical, USA ("Dow") latex manufacturing facility. On January 26, 1990, the jury returned a verdict for Respondents, consisting of $450,000 in compensatory damages and $2,000,000 in punitive damages.[1] Immediately after the jury was dismissed, Dow's trial counsel requested an extension of time to file motions for judgment notwithstanding the verdict ("JNOV") and a new trial. With the express consent of Respondents' counsel, the court assured Dow that it could have additional time to file post-trial motions.[2] App. 33a-34a.

After the entry of judgment on the jury's verdict on January 29, 1990, the district court granted written consent orders, agreed to by both parties, extending Dow's deadline to file post-trial motions until March 8, 1990. App. 35a-36a. In compliance with the court's deadline, Dow filed a motion for JNOV under Fed. R. Civ. P. 50(b), or alternatively, for a new trial under Fed. R. Civ. P. 59. The motion was denied on May 3, 1990 and Dow filed its notice of appeal to the Eleventh Circuit Court of Appeals on May 25, 1990. App. 37a, 39a-40a.

By order, the appellate court *sua sponte* questioned the timeliness of Petitioner's appeal,[3] and requested that the

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[1] Federal jurisdiction was based on diversity of citizenship, 28 U.S.C. § 1332.

[2] Extensions were requested due to the trial schedules of Dow's trial counsel and to provide sufficient time to receive and review transcripts.

[3] Rules 50 and 59 of the Federal Rules of Civil Procedure require that JNOV and new trial motions be served not later than ten days after the entry of judgment. Immediately after the jury's verdict and before the entry of judgment in this case, the district court

court's jurisdiction be briefed along with the merits under the "unique circumstances" doctrine of *Wolfsohn* v. *Hankin*, 376 U.S. 203 (1964), and its Eleventh Circuit progeny. A divided court of appeals subsequently dismissed petitioner's appeal as untimely. *Pinion* v. *Dow Chem., USA*, 928 F.2d 1522 (11th Cir. 1991). Dow's petition for rehearing and suggestion for rehearing en banc was filed on May 9, 1991 and denied on June 27, 1991. The mandate issued on July 8, 1991.

REASONS FOR GRANTING THE WRIT

As the dissent below demonstrates, the unique circumstances presented in this case are indistinguishable from those found sufficient in *Wolfsohn* v. *Hankin*, *supra*, to support the court of appeals' jurisdiction, and accordingly this Court might summarily reverse here as it did in *Wolfsohn*. Absent summary reversal, however, certiorari should be granted to resolve the conflict among the Third, Fifth, Seventh, Ninth, Eleventh, and D.C. Circuits regarding the application of the Court's longstanding "unique circumstances" doctrine. Plenary review is especially warranted now since several circuits have questioned the continued vitality of *Wolfsohn* as have a substantial minority of this Court in *Houston* v. *Lack*, 487 U.S. 266, 282 (1988) (Scalia, J. dissenting).

I. THE ELEVENTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *WOLFSOHN* v. *HANKIN*

This Court has long recognized that there may be "unique circumstances" which preserve jurisdiction to hear an appeal that is technically not timely. *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S.

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expressly agreed to extend petitioner's due date for such motions. Neither counsel for either party nor the court noted Rule 6(b) which provides that the district court may not extend these deadlines.

215 (1962) (per curiam); *Thompson* v. *I.N.S.*, 375 U.S. 384 (1964) (per curiam); *Wolfsohn* v. *Hankin*, 376 U.S. 203 (1964) (per curiam). The problem giving rise to the "unique circumstances" doctrine typically occurs when a district court, without authority under the Federal Rules, grants a good faith request by counsel for a time extension to file post-trial motions and the party then relies to his detriment on the court's order only to have the timeliness of his appeal subsequently challenged before the appellate court.

The *Harris Truck* trilogy of cases specify three criteria, each of which must be satisfied, in order for the appellate court to accept jurisdiction in such cases. *First*, the appellant must have done "an act which, if properly done, [would have] postponed the deadline for the filing of his appeal." *Thompson*, 375 U.S. at 387. *Second*, the district court, albeit erroneously, must have concluded that the act had been properly done. *Id. And finally*, the appellant must have relied on the district court's action and filed an appeal "within the assumedly new deadline." *Id.*

The majority below agreed that the "most similar" case in this Court's "unique circumstances" trilogy is *Wolfsohn* v. *Hankin*, *supra*. *See* 928 F.2d at 1527. It did not attempt to distinguish *Wolfsohn*, however, since the facts there were indistinguishable from those present here.[4] Specifically, the district court in *Wolfsohn* entered summary judgment against the petitioner and then, four days later, signed an order purportedly extending the petitioner's time for filing Rule 59 motions. The petitioner then filed its Rule 59 motion within the extended limit set by the district court. Noting that Rule 6(b) prohibited such extensions, the D.C. Circuit dismissed for lack of jurisdiction only to be summarily reversed by this Court. *Wolfsohn*, 376 U.S. at 203.

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[4] The facts and procedural history of *Wolfsohn* are set out in the circuit court's opinion, 321 F.2d 393 (D.C. Cir. 1963).

The circumstances for entertaining Dow's technically untimely appeal here are, if anything, even more compelling than in *Wolfsohn*. As in *Wolfsohn*, Dow complied with each of the three "unique circumstances" criteria of *Harris* and *Thompson*. Moreover, the record here demonstrates plainly that Dow subsequently filed its technically untimely appeal in reliance on assurances (albeit mistaken) from the district court that its interests would be protected. The following colloquy took place on January 26, 1990, shortly after the jury's verdict against Dow:

> MR. COCKRILL [Dow's counsel]: On the J.N.O.V. motions, those are normally due in ten days. *Is there any way we can get an extension*? We're scheduled to go to trial a week from Monday.
>
> THE COURT: I have no problem. Mr. Cook?
>
> MR. COOK [Pinions' counsel]: No Your Honor.
>
> MR. COCKRILL: If we could have thirty days to submit those, that would help us.
>
> THE COURT: Well, *you certainly may*, unless there is objections to the thirty days.
>
> MR. COOK: No, no.
>
> THE COURT: Do you have time to send the Court an Order giving you the extension?
>
> MR. COCKRILL: Sure.
>
> THE COURT: If you will do that, *I'll enter it and take care of you.*
>
> MR. COCKRILL: I'll make it thirty days from today.
>
> THE COURT: Yes, sir.
>
> MR. COCKRILL: Thank you.
>
> THE COURT: Is that just for the J.N.O.V.?
>
> MR. COCKRILL: It will be a Rule 50 motion, probably alternatively for a new trial, but we need to take a look at the situation, obviously.

App. 33a-34a (R14-617-618) (emphasis supplied).

Had Respondents' counsel objected at any stage to the extensions sought by Petitioner, the instant case might be

distinguishable from *Wolfsohn*. But, as Judge Johnson noted in dissent:

> [Respondents] and Dow entered a consent agreement, later ratified by the court, allowing Dow to file an untimely new trial motion. Now, with a $2.45 million judgment at stake, the Pinions are in the unseemly position of attacking that consent agreement. It is not proper to manipulate this equitable doctrine to benefit the Pinions in contravention of the basic principle of equity that "he [or she] who comes into equity must come with clean hands." [5]

Accordingly, the decision below conflicts directly with *Wolfsohn* and, like *Wolfsohn* ought to be summarily reversed unless the Court wishes to reconsider the "unique circumstances" doctrine for the reasons noted below.

II. THE DECISION BELOW CONTRIBUTES TO THE GROWING CONFLICT IN THE CIRCUITS REGARDING THE SCOPE OF THE UNIQUE CIRCUMSTANCES DOCTRINE.

In the 25 years since *Harris Truck*, *Thompson* and *Wolfsohn*, the circuits have diverged as to what the unique circumstances doctrine means and how it should be applied. The majority below readily acknowledged that "there appears to be some disagreement among courts as to how broadly the 'unique circumstances' exception is to be applied"—a disagreement which the majority attributed to this Court's "recent emphasis on the mandatory nature of jurisdictional prerequisites." 928 F.2d at 1530.

The principal split among the circuits concerns what types of actions by the district court are needed to trigger the exception. Such an inquiry would seem to contradict *Wolfsohn* since, as the dissent here notes, "[t]he focus of the unique circumstances doctrine is on why the appellant

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[5] 928 F.2d at 1537-38 (quoting *New York Football Giants, Inc.* v. *Los Angeles Chargers Football Club, Inc.*, 291 F.2d 471, 473 (5th Cir. 1961)).

failed to timely file his notice of appeal, not on why the appellant thought he or she could file the underlying [unauthorized] motion." 928 F.2d at 1537. Nonetheless, the Third, Seventh and Ninth Circuits, apparently anticipating that this Court might overrule *Wolfsohn*, have reinterpreted the doctrine to require express assurances from the district court, presumably at least as explicit as those given by the district court here. See p. 5, *supra*.

The Third Circuit, for example, has said that the "scope of the 'unique circumstances' rule remains murky," but that the courts "are not free to sound the death knell for a rule enunciated by the Supreme Court and never retracted by it." *Kraus* v. *Consolidated Rail Corp.*, 899 F.2d 1360, 1364 (3d Cir. 1990). The Third Circuit has accomplished nearly the same result, however, by requiring "some express, affirmative statement by the district court that a motion is timely." *Smith* v. *Evans*, 853 F.2d 155, 161 (3d Cir. 1988).

The Seventh Circuit, likewise, requires an "affirmative representation" by the district court in order for the "unique circumstances" doctrine to apply. *Green* v. *Bisby*, 869 F.2d 1070, 1072 (7th Cir. 1989) (citing *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 179 (1989)). The Seventh Circuit in *Green*, without mentioning *Wolfsohn*, thus has held that the court's entry of a time extension for Rule 59 motions is not, standing alone, sufficient to trigger the "unique circumstances" exception. 869 F.2d at 1072. Judge Easterbrook has advocated the most narrow exception, essentially suggesting that the express prohibition of time extensions in Rule 6(b) should always preclude arguments of reasonable reliance on erroneous district court actions. *Bailey* v. *Sharp*, 782 F.2d 1366, 1371 (7th Cir. 1986) (concurring opinion).

The Ninth Circuit has adopted a similarly narrow construction, allowing the "unique circumstances" exception "only where a court has affirmatively assured a party

that its appeal will be timely." *In re Slimick*, 928 F.2d 304, 310 (9th Cir. 1990) (citing *Osterneck*, 489 U.S. at 179). Therefore, where the district court "neither explicitly extended the deadline" for appeal nor "specifically assured appellants that the appeal period would not begin," the "unique circumstances" doctrine was held not to apply. *Slimick*, 928 F.2d at 309.

By contrast, the Fifth and District of Columbia Circuits still adhere to the doctrine as originally spelled out in *Harris Truck*, *Thompson* and *Wolfsohn*. For example, in *Fairley* v. *Jones*, 824 F.2d 440 (5th Cir. 1987), the Fifth Circuit held that "unique circumstances" existed where the magistrate merely extended the time for a new trial motion without any assurances to the party that the order was authorized or that a later appeal would be timely. Likewise, in *Aviation Enters., Inc.* v. *Orr*, 716 F.2d 1403 (D.C. Cir. 1983), the District of Columbia Circuit accepted jurisdiction where the appellant relied on a district court order without any express assurances by the court that the order extended appellant's time for appeal. *See also Webb* v. *Department of Health and Human Servs.*, 696 F.2d 101, 106 (D.C. Cir. 1982) (unique circumstances existed "although Webb did not rely on an express statement by the district court").

Dow's appeal would undoubtedly have been deemed timely under the Fifth and D.C. Circuit rules and likely in other circuits as well given Respondents' consent to Dow's requested extension and the district court's assurances that it "would take care of" Dow's counsel in light of his upcoming trial commitment. The majority below, however, rejected these decisions and sided uneasily with the Third, Seventh and Ninth Circuits while trying to reconcile the result here with the Eleventh Circuit's own more lenient precedents. *Butler* v. *Coral Volkswagen, Inc.*, 804 F.2d 612 (11th Cir. 1986); *Willis* v. *Newsome*, 747 F.2d 605 (11th Cir. 1984); *Inglese* v. *Warden, U.S. Penitentiary*, 687 F.2d 362 (11th Cir. 1982).

According to the majority, the "critical jurisdictional question becomes: Was it *reasonable* for Dow to rely upon the district court's improper extension of time for filing post-trial motions, in spite of the explicit language of Rule 6(b) prohibiting the district court from granting such an extension?" 928 F.2d at 1532. While disclaiming a "formalistic inquiry" that would focus only on the presence or absence of affiramtive statements, *id.* at 1533 n.9, the majority apparently would only accept evidence "that the party has been affirmatively and primarily misled by the court" as grounds for applying what remains of the "unique circumstances" exception. *Id.* at 1532. But nothing in *Wolfsohn* requires such a showing and Judge Johnson is surely correct that "the majority's opinion can be fairly read as holding that if the litigant is not pro se . . . and if the court does not make any 'emphatic' assurances then the litigant will be presumed not to have established the existence of unique circumstances." 928 F.2d at 1536 (Johnson, J., dissenting).

This case provides the opportunity for the court to resolve the confusion that has led the majority below and other circuits to fashion rules that conflict not only with other circuits but with *Wolfsohn* itself. Absent authoritative guidance from this Court, the circuits will continue struggling with whether the doctrine should be applied as originally written and how, if at all, the doctrine can be modified without obliterating it altogether.

III. THIS COURT'S RECENT DECISIONS RECOGNIZE THE NEED TO REAFFIRM OR OVERRULE THE "UNIQUE CIRCUMSTANCES" DOCTRINE

This Court's recent decisions are plainly the source of the circuit court conflict summarized above. While purporting to preserve the "unique circumstances" doctrine, many circuit court opinions have questioned its vitality even though the Court has not revisited the doctrine since 1963. *See, e.g., Kraus*, 899 F.2d at 1360; *In re Slimick*, 928 F.2d at 309 n.7; *Sonicraft, Inc.* v. *N.L.R.B.*, 814 F.2d

385, 387 (7th Cir. 1987); *Parke-Chapley Constr. Co.* v. *Cherrington*, 865 F.2d 907, 913 n.6 (7th Cir. 1989); *Smith*, 853 F.2d at 160-61; *Fairley*, 824 F.2d at 443.

The two decisions most frequently used by the circuits to discern this Court's turning away from the "unique circumstances" doctrine are *Browder* v. *Director, Dep't of Corrections of Ill.*, 434 U.S. 257 (1978), and *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56 (1982). In *Browder*, the state moved 28 days after judgment for a stay and evidentiary hearing (treated as Rule 52(b) or Rule 59 motions governed by the 10 day time limit). The district court granted the stay and set the matter down for an evidentiary hearing. The state appealed within thirty days of the evidentiary hearing, but not within thirty days of the original judgment. Without discussing the "unique circumstances" doctrine (which would appear inapplicable in any event),[6] this Court held the state's appeal untimely because the 30 day time limit for appeals is "mandatory and jurisdictional." 434 U.S. at 264 (1977) (citations omitted). Even less applicable is *Griggs*, where the Court ruled that the court of appeals lacked jurisdiction because a motion to reconsider was still pending when the notice of appeal was filed, thus making the notice of appeal invalid under Fed. R. App. P. 4(a). 459 U.S. at 61.

Neither *Browder* nor *Griggs* were "unique circumstances" cases nor do they indicate whether the doctrine is still viable. Nonetheless, the majority below cited them as evidencing a "drift of recent Supreme Court decisions reiterating the [filing] rules' strictness." 928 F.2d at 1534. Like the Third Circuit in *Kraus*, the majority felt that "[t]he unique circumstances exception, which expands the district court's power to affect the jurisdictional prerequisites, runs counter to the spirit of *Browder*

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[6] The state's motion was filed after the 10 day period for new trial motions and there is nothing to indicate that it was granted before the expiration of the 30 day period for noticing an appeal.

and *Griggs*." 899 F.2d at 1363. While agreeing that lower courts may not "sound the death knell for a rule enunciated by the Supreme Court and never retracted by it," *Kraus*, 899 F.2d at 1364, these decisions have used notions such as the "drift" and "spirit" of this Court's decisions to achieve the same result.[7]

The *de facto* overuling of *Harris Truck*, *Thompson* and *Wolfsohn* has gained considerable momentum from Justice Scalia's dissent in *Houston* v. *Lack*, 487 U.S. 266 (1988). Joined by the Chief Justice and Justices O'Connor and Kennedy, Justice Scalia there suggested that *Browder* and *Griggs* "effectively repudiate the *Harris Truck Lines* approach, affirming that the timely filing of a notice of appeal is 'mandatory and jurisdictional.' " 487 U.S. at 282.

Justice Scalia's *Houston* dissent speaks only for a minority and in any event must be reconciled with the Court's more recent reliance on the "unique circumstances" doctrine in *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169 (1989). There, the Court said that "[b]y its terms, *Thompson* applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." 489 U.S. at 179. However, this restatement of the doctrine, by itself, has spawned confusion among

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[7] For example, the Tenth Circuit has determined that since an appellant has a "duty to familiarize himself with the appellate rules," he cannot claim reasonable reliance where he "knew or should have known" that no extension could be granted. *Certain Underwriters at Lloyds of London* v. *Evans*, 896 F.2d 1255, 1258 (10th Cir. 1990). Similarly, the Seventh Circuit in *Parke-Chapley* noted that reasonable counsel could not have been misled by the trial court's statement due in part to the "relative ease" with which counsel could have read the rules. 865 F.2d at 914. The Eleventh Circuit below also noted the ease with which Dow could have read Rule 6(b) in its determination that Dow unreasonably relied on the district court. 928 F.2d at 1534.

the circuits, including specifically, whether the "specific assurances" mentioned by the Court is satisfied by court orders or whether more explicit assurances about the timeliness of movant's appeal are required. *See, e.g., Pinion*, 928 F.2d at 1531-32 n.8; *Smith*, 853 F.2d at 159; *Slimick*, 928 F.2d at 310 n.8.

Given the uncertainty generated by this Court's own rulings, plenary review is needed to determine whether the "unique circumstances" exception is still valid in light of later decisions and, if so, what the scope of the doctrine should be. Despite the growing uncertainty reflected in the lower court opinions, the appellate courts must continue to apply the doctrine until it is retracted by this Court. Whether the Court reaffirms or overrules the doctrine, scarce judicial resources will be saved if the Court provides authoritative guidance by accepting review in this case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment of the Court of Appeals for the Eleventh Circuit. In the alternative, the decision below should be summarily reversed based on *Wolfsohn* v. *Hankin*.

Respectfully submitted,

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Dated: September 24, 1991

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 90-8508

MR. JESSE PINION, MRS. JESSE PINION,
Plaintiffs-Appellees,

MAURICE DAFFRON, SHIRLEY DAFFRON,
Plaintiffs,

v.

DOW CHEMICAL, U.S.A.,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

April 19, 1991

Before FAY and JOHNSON, Circuit Judges, and PECK*, Senior Circuit Judge.

FAY, Circuit Judge:

This case presents a close jurisdictional question involving the potential application of the so-called "unique cir-

* Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

cumstances" doctrine, a judicially created exception to mandatory filing rules that sometimes justifies our exercise of jurisdiction over untimely appeals. Defendant-appellant Dow Chemical U.S.A. ("Dow") appeals the district court's denial of several post-trial motions challenging a final judgment entered in favor of plaintiffs-appellees Mr. and Mrs. Jesse Pinion ("the Pinions"). Dow's post-trial motions, however, were not timely filed, and thus did not toll the time for filing its notice of appeal under Fed.R.App.P. 4(a)(4). Normally, because appellate Rule 4's filing deadlines are mandatory and jurisdictional, a party's failure to comply with them is fatal to our ability to hear an appeal.

Dow, however, claims detrimental reliance on two district court consent orders which, in spite of the plain language of Fed.R.Civ.P. 6(b) expressly prohibiting such action, enlarged the time for filing post-trial motions under Fed.R.Civ.P. 50(b) and 59. Without the court's extension, Dow still could have filed timely post-trial motions and a timely notice of appeal. Because Dow complied fully with the extended deadlines set by the district court, and because the court eventually ruled on the merits of Dow's post-trial motions, Dow argues that these are "unique circumstances" that justify our assuming jurisdiction of this appeal.

We first consider the propriety of the district court's extension of the filing deadlines for motions under Rules 50(b) and 59(a). We conclude that the court was clearly without authority or jurisdiction to do so, thus rendering Dow's post-trial motions and notice of appeal untimely. We then consider whether Dow's untimely filed notice of appeal is nevertheless rehabilitated by the application of the Supreme Court's equitable "unique circumstances" exception to the rigid filing requirements of Rule 6(b) and appellate Rule 4. We find that Dow's admitted inadvertence in simply failing to read Rule 6(b) cannot

engender the kind of reasonable reliance contemplated by the Court's narrow "unique circumstances" exception, especially in light of the mandatory and jurisdictional nature of the filing rules at issue. We therefore must DISMISS Dow's appeal as untimely.

I. *Procedural Background.*

On January 29, 1990, following a jury verdict in favor of the Pinions, the district court entered a final judgment against Dow in the amount of two million, four hundred and fifty thousand dollars, plus interest and costs.[1] Two days later, the district court entered a consent order, in response to a request by Dow, granting a thirty-day extension to the parties to file any post-trial motions.[2] The court entered another consent order on February 23, 1990, extending the filing deadline for post-trial motions to March 8, 1990. The Pinions expressly consented to both extensions. On March 8, in compliance with the court's deadline, Dow filed a motion for judgment notwithstanding the verdict under Fed.R.Civ.P. 50(b) or, alternatively, for a new trial under Fed.R.Civ.P. 59. The court denied Dow's motion in an order dated May 5, 1990. Dow subsequently filed its notice of appeal with the district court on May 5, 1990.

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[1] The jury had awarded the Pinions four hundred and fifty thousand dollars in compensatory damages, and two million dollars in punitive damages.

[2] Fed.R.Civ.P. 6(b) expressly prohibits district courts from "extend[ing] the time for taking any action" under Rules 52(b) and 59. Notwithstanding this Rule, Dow explains in its initial brief that the "extensions were requested due to the trial schedules of Dow's trial counsel as well as to provide sufficient time to receive and review trial transcripts. Dow's counsel inadvertently overlooked the 6(b) prohibition and did not intentionally ask the trial court to enter an unauthorized order." *Brief of Appellant* at -x-, n. 3.

II. *Discussion.*

Although neither party initially raised the issue, we are of course obligated to examine our jurisdiction *sua sponte*. *See Finn v. Prudential-Bache Securities, Inc.*, 821 F.2d 581, 585 (11th Cir.1987), *cert. denied*, 488 U.S. 917, 109 S.Ct. 274, 102 L.Ed.2d 262 (1988). By memorandum dated June 26, 1990, the parties were requested by the clerk of our court to respond to the jurisdictional question. The presentation of the issues was largely as follows: (1) Notwithstanding the consent of the parties, did the district court lack jurisdiction to extend the time to file post-trial motions pursuant to Rules 50(b) and 59, in light of Fed.R.Civ.P. 6(b), which expressly prohibits such an extension? (2) Even if the district court lacked jurisdiction, is Dow's notice of appeal nevertheless effective under the "unique circumstances" doctrine, which sometimes allows appellate courts to entertain untimely appeals? We consider these issues in turn below.

A. *Timeliness of Dow's Appeal.*

In civil cases in which an appeal is permitted as of right from a district court to a court of appeals, a party is required to file a notice of appeal with the clerk of the district court within 30 days after the date of entry of the judgment or order from which the party is appealing. Fed.R.App.P. 4(a)(1). The Supreme Court has emphasized that the timely filing of a notice of appeal is " 'mandatory and jurisdictional.' "[3] *Houston v. Lack*, 487

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[3] We note that the requirement that a notice of appeal be timely filed is not "jurisdictional" in the sense of subject matter jurisdiction, since such time limits and the circumstances for extending them are fixed by the Rules, which Fed.R.App.P. 1(b) declares are not to be construed to extend or limit our jurisdiction as established by law. *See* 9 Moore's Federal Practice ¶ 204.02[2] at 4-14. As mandatory preconditions to our exercise of jurisdiction, however, filing rules like rule 4(a) are "jurisdictional" in the sense that, absent compliance, we can acquire no jurisdiction of the cause even if it is otherwise within our competence. *Id.*

U.S. 266, 282, 108 S.Ct. 2379, 2388, 101 L.Ed.2d 245 (1988) (Scalia, J., dissenting); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 61, 103 S.Ct. 400, 401, 403, 74 L.Ed.2d 225 (1982); *Browder v. Director, Dep't of Corrections of Illinois*, 434 U.S. 257, 264, 98 S.Ct. 556, 560, 54 L.Ed.2d 521 (1978); *United States v. Robinson*, 361 U.S. 220, 224, 80 S.Ct. 282, 285, 4 L.Ed.2d 259 (1960); *see T[illegible]es v. Oakland Scavenger Co.*, 487 U.S. 312, 315, 108 S.Ct. 2405, 2408, 101 L.Ed.2d 285 (1988). As the Seventh Circuit has reiterated recently, this proposition "means what it says: if an appellant does not file his notice of appeal on time, we cannot hear his appeal." *Vahol v. National R.R. Passenger Corp.*, 909 F.2d 1557, 1561 (7th Cir.1990) (per curiam) (en banc).

According to the appellate Rules, a *timely* motion filed under Fed.Rs.Civ.P. 50(b) or 59 may toll the running of time for a notice of appeal; an untimely filed post-trial motion, however, will not suffice. *See Browder*, 434 U.S. at 264-65, 98 S.Ct. at 560-61; *Kraus v. Consolidated Rail Corp.*, 899 F.2d 1360, 1362 (3d Cir.1990); *Butler v. Coral Volkswagen, Inc.*, 804 F.2d 612, 617 (11th Cir. 1986); Fed.R.App.P. 4(a)(4). In order to be considered timely, post-trial motions pursuant to Rules 50(b) or 59 must be served within ten (10) days after entry of the district court's judgment. Fed.R.Civ.P. 50(b); Fed.R. Civ.P. 59(b). Further, Fed.R.Civ.P. 6(b) unequivocally states that a district court "may not extend the time for taking any action under Rules *50(b)* and (c)(2), 52(b), *59(b)*, (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them." Fed.R. Civ.P. 6(b) (emphasis added). The Rules at issue in this case—Rules 50(b) (motion for JNOV) and 59(a), (b) (motion for new trial)—do not provide any mechanism for extending their prescribed ten-day filing deadlines.

Moreover, the Supreme Court has taken a restrictive view of a district court's power to extend a litigant's time

to perform a jurisdictional act, *Kraus*, 899 F.2d at 1363,[4] and the mandatory nature of the filing rules "is not altered merely by the fact that the district court decided the merits of an untimely new trial [or JNOV] motion." *Butler*, 804 F.2d at 617. We have stressed repeatedly the jurisrdictional, non-discretionary character of the Rule 6(b) admonition regarding the filing deadlines for such post-trial motions. *See Wright v. Preferred Research, Inc.*, 891 F.2d 886, 890 (11th Cir.1990) (per curiam) (ten day period for filing Rule 59 motion "is jurisdictional and cannot be extended by the court"), *Pate v. Seaboard R.R., Inc.*, 819 F.2d 1074, 1084 (11th Cir.1987) (ten day period "for serving new trial motions is jurisdictional and cannot be extended in the discretion of the district court"); *Gribble v. Harris*, 625 F.2d 1173, 1174

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[4] In *Browder*, for example, the state failed to file a notice of appeal within thirty days after the district court entered its order granting a petition for habeas corpus. Holding that the state's appeal was untimely, the Court found that the state's motion to stay execution and to conduct an evidentiary hearing, which had been filed 28 days after the order, did not constitute a timely Rule 52(b) or 59 motion. This was done despite the fact that the district court had granted the stay and had held a hearing before denying the state's motion on the merits.

Though the state's failure to file a timely notice of appeal and its failure to request an extension of time in which to appeal obviously reflected reliance on the district court's actions, the Court noted that the state's motion was nevertheless untimely under the Rules, and therefore could not toll the running of time to appeal under Fed.R.App.P. 4. *Browder*, 434 U.S. at 267, 98 S.Ct. at 562. The Court explained that the 1946 amendments to the Rules of Civil Procedure abolishing terms of court changed the common law rule under which a court had the power to alter or amend its own judgments during the term of court in which the original judgment was entered. The amended Rules "confined the power of a district court to alter or amend a final order to the time period stated in Rules 52(b) and 59." *Id.* at 271, 98 S.Ct. at 564.

A comparably strict interpretation of the jurisdictional requirements established in the Federal Rules was reiterated in *Griggs*, 459 U.S. 56, 103 S.Ct. 400 (court of appeals had no jurisdiction because motion to reconsider was pending when notice of appeal was filed, even though motion was decided four days later).

(5th Cir. Unit A 1980) (Federal Rules of Civil Procedure establish strict 10-day delay periods for filing Rule 52 and Rule 59 motions that are jurisdictional and cannot be extended in the discretion of the district court).[5]

In this case, it is undisputed that, in the face of the express language of Rule 6(b), the district court's entry of the two consent orders purporting to enlarge the time within which Dow could file its post-trial motions was clearly beyond the court's authority. Consequently, Dow's alternative motions for JNOV or new trial, filed thirty-eight days after the court's entry of judgment, were not timely. Unless there is some basis for an exception, Dow's notice of appeal was ineffective, since its untimely post-trial motions did not toll Fed.R.App.P. 4's thirty-day filing requirement.

B. *The "Unique Circumstances" Exception.*

Dow acknowledges that it is "clear . . . that the trial court did not have the authority to grant the extensions requested by Dow." *Brief* of Appellant at -ix-. Dow argues, however, that Rule 6(b)'s prohibition against extensions of time for filing post-trial motions must be tempered by equitable considerations. Specifically, Dow relies upon a trio of Supreme Court cases decided in the early 1960's that developed a narrow "unique circumstances" exception to the strict, jurisdictional requirements of the filing rules. *See Wolfsohn v. Hankin*, 376 U.S. 203, 84 S.Ct. 699, 11 L.Ed.2d 636 (1964) (per curiam); *Thompson v. INS*, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964) (per curiam); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962) (per curiam). We consider the exception more fully below.

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[5] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), the Eleventh Circuit Court of Appeals adopted as precedent the decisions of the former Fifth Circuit issued before October 1, 1981.

1. *Origins.*

Essentially, under the "unique circumstances" doctrine,

> [c]ourts will permit an appellant to maintain an otherwise untimely appeal in unique circumstances in which the appellant reasonably and in good faith relied upon judicial action that indicated to the appellant that his assertion of his right to appeal would be timely, so long as the judicial action occurred prior to the expiration of the official time period such that the appellant could have given timely notice had he not been lulled into inactivity.

Willis v. Newsome, 747 F.2d 605, 606 (11th Cir.1984).

The principle was first enunciated by the Supreme Court in *Harris Truck Lines*. That case dealt with a finding under Fed.R.Civ.P. 73(a) (now Fed.R.App.P. 4(a)), which expressly allowed a district court to extend the time within which to file a notice of appeal. The district court, acting before the expiration of the thirty days automatically available for an appeal, had extended the time to sixty days, as the Rule permits, for "excusable neglect or good cause." The Seventh Circuit, however, dismissed the appeal, finding that the circumstances on which the district court relied did not amount to "excusable neglect or good cause." The Supreme Court reversed:

> In view of the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the 30-day period and then suffers reversal of that finding, it should be given great deference by the reviewing court. Whatever the proper result as an initial matter on the facts here, *the record contains a showing of unique circumstances sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling.*

Harris Truck Lines, 371 U.S. at 217, 83 S.Ct. at 285 (emphasis added).

Harris Truck Lines was followed two years later by *Thompson*. Twelve days after final judgment, Thompson notified INS that he planned to file a motion for a new trial. INS raised no objection; the district court specifically stated that the new trial motion was filed "in ample time," and went on to decide the motion on the merits. 375 U.S. at 385, 84 S.Ct. at 398. Within sixty days of the denial of the new trial motion, but not within sixty days of judgment, Thompson appealed. The Court recognized that the Federal Rules, if mechanically applied, would prevent the appeal. The Court, however, allowed the appeal, finding that the case fit within the *Harris Truck Lines* exception:

> The instant cause fits squarely within the letter and spirit of *Harris*. Here, as there, petitioner did an act which, if properly done, postponed the deadline for filing his appeal. Here, as there, the District Court concluded that the act had been properly done. Here, as there, the petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline. And here, as there, the Court of Appeals concluded that the District Court had erred and dismissed the appeal. Accordingly, in view of these "unique circumstances," . . . we grant the writ of certiorari, vacate the judgment, and remand the case to the Court of Appeals so that petitioner's appeal may be heard on the merits.

Thompson, 375 U.S. at 387, 84 S.Ct. at 398-99 (citations omitted).

In *Wolfsohn*, a case decided later that same term (and the case most similar to ours), the district court entered summary judgment for defendant on May 7, 1962. Four days later, the district court signed an order purportedly granting an extension of time for plaintiff to file a motion for rehearing. On June 11, the motion for rehearing was filed. It was denied on October 12, and an ap-

peal was noticed on November 3, almost five months after the judgment was rendered. The court of appeals held that the district court was without power to enlarge the time for filing a motion for rehearing. Since the motion for rehearing was therefore untimely, the court held that the time for taking an appeal was not tolled. The Supreme Court, on authority of *Thompson* and *Harris Truck Lines*, summarily reversed without opinion the judgment of the court of appeals. 376 U.S. 203, 84 S.Ct. 699.[6]

Our Circuit has invoked the "unique circumstances" exception on only a few occasions. *Inglese v. Warden, U.S. Penitentiary*, 687 F.2d 362 (1982) involved an appeal from a dismissal of a petition for a writ of habeas corpus. Because the district court had entered final judgment on January 12, 1981, the 10-day period for filing a Rule 59(e) motion expired on January 22. On January 27, the district court entered an order extending the time for the prisoner to file his motion, and after a second similar extension, the petitioner eventually filed the motion on February 27. On May 1, the court denied the motion, and the prisoner appealed the judge's dismissal of the writ.

In a brief per curiam opinion, a panel of our Circuit stated that at first blush, the Rule 59(e) motion was untimely, since it was not filed within ten days after an entry of judgment, and the district court had no authority to enlarge the ten-day period. Nevertheless, citing *Thompson* and *Wolfsohn*, we held jurisdiction proper under the circumstances:

> [A]n appeal will not be dismissed as untimely when the appellant files a post-trial motion which, if timely filed, would postpone the deadline for filing his ap-

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[6] The facts and procedural history of *Wolfsohn* are found in the circuit court opinion, 321 F.2d 393 (D.C.Cir.1963). The Supreme Court's memorandum opinion did not give a statement of facts.

> peal; the government does not object to the timeliness of the motion; the district court indicates that the post-trial motion is timely; and the appellant relies on that indication and files his appeal within what the parties and the district court believe to be the new deadline.

Inglese, 687 F.2d at 363 (citations omitted).

This Circuit also applied the exception in *Willis v. Newsome*, 747 F.2d 605 (11th cir. 1984). In *Willis*, the court clerk erroneously told the appellant that if notice of appeal was mailed on the thirtieth day after judgment, the motion would be stamped on the day mailed. Appellant mailed the notice on the thirtieth day, but it arrived and was stamped on the thirty-first day. Although the original panel dismissed the appeal as untimely, on rehearing the case was remanded to the district court for purposes of determining whether Willis reasonably and in good faith relied upon a representation by the district court as to the timeliness of his notice. The court reasoned:

> If Willis was indeed relying on the district court's representation that his notice of appeal would be timely if mailed on September 21, and was thus lulled into failing to arrange for an alternative method of filing or moving for an extension of time to file, the appeal should not have been dismissed as untimely. Courts will permit an appellant to maintain an otherwise untimely appeal in unique circumstances in which the appellant reasonably and in good faith relied upon judicial action that indicated to the appellant that his assertion of his right to appeal would be timely, so long as the judicial action occurred prior to the expiration of the official time period such that the appellant could have given timely notice had he not been lulled into inactivity.

747 F.2d at 606.

Most important for our purposes is our Circuit's opinion in *Butler v. Coral Volkswagen, Inc.* There, the defendant moved under Rule 59 for new trial on the tenth day after entry of judgment, but failed to specify grounds for the motion, and requested an extension of time to file a supporting memorandum doing so. The district court granted the extension, the memorandum was submitted, and the motion was ultimately denied on the merits. Within thirty days of the denial, but more than thirty days after entry of judgment, defendant appealed. Accepting jurisdiction of the defendant's appeal, a panel of our Circuit found the case to be "virtually identical" to the scenario considered by the Supreme Court in *Wolfsohn*. *Butler*, 804 F.2d at 616. Thus, citing *Wolfsohn* and our earlier decision in *Willis*, the panel held:

> As in *Wolfsohn*, appellant here reasonably relied on an erroneous district court order granting an extension of time to file a new trial motion. If Coral's motion had been dismissed as it should have been, Coral would have had plenty of time to perfect its appeal. As in *Willis*, appellant here was 'lulled into inactivity' by the action of the district court. If reliance on the informal advice of the clerk's office can justify an equitable extension of the appeal period, certainly reliance on an order of the district court granting an extension of time to amend a timely filed but insufficient new trial motion can achieve this result.

Butler, 804 F.2d at 617.

The panel in *Butler*, however, also went out of its way to stress the narrowness of its holding. It reiterated that the "30-day period for filing appeals is a strict requirement," and "adhere[d] to the position that an untimely filed motion for new trial does not toll the time for filing an appeal." *Id.* Nevertheless, the court felt constrained to deny appellees' motion to dismiss:

> While there is no doubt that the district court erred in entering its order of March 26, 1986 extending Coral's time in which to file its motion for new trial, we have no alternative but to deny appellee's motion to dismiss the appeal. The purported motion for new trial filed by Coral on March 14 was not a motion for new trial, the district court had no authority to extend the time for filing such a motion, and Coral did not file a timely notice of appeal. Notwithstanding these breaches of the Federal Rules of Civil Procedure . . . we are required by Supreme Court precedent to allow the appeal under the "unique circumstances" doctrine. We cannot distinguish this case from *Wolfsohn v. Hankin*, 376 U.S. 203, 84 S.Ct. 699, 11 L.Ed.2d 636 (1964). We would adjure district courts not to grant motions to extend time . . . .

804 F.2d at 617. The court then expressed its "concern in this area" by recalling Justice Clark's *Wolfsohn* dissent, which objected that the Supreme Court " 'has given trial judges the *de facto* power to grant extensions of time, directly *contra* to the definite requirements of Rules 52(b) and 59 and the command of Rule 6(b).' " *Butler*, 804 F.2d at 617-18 (quoting *Wolfsohn*, 376 U.S. at 203, 84 S.Ct. at 699 (Clark, J., dissenting)).

2. *Vitality.*

In the twenty-five years since the *Harris Truck Lines* trilogy of cases, no Supreme Court case has followed its precedent. Further, it is clear that the "unique circumstances exception, which expands the district court's power to affect the jurisdictional prerequisites, runs counter to the spirit of" decisions like *Browder* and *Griggs*—that is, decisions that have emphasized strict interpretations of the Federal Rules' jurisdictional requirements. *Kraus*, 899 F.2d at 1363. Indeed, Justice Scalia, dissenting in a recent case, and joined by Chief Justice Rehn-

quist, along with Justices Kennedy and O'Connor, appeared to reject the "unique circumstances exception" outright: "Petitioner asserts that [*Harris Truck Lines, Thompson, & Wolfsohn*] establish an equitable doctrine that sometimes permits the late filing of notices of appeal. Our later cases, however, effectively repudiate the *Harris Truck Lines* approach, affirming that the timely filing of a notice of appeal is 'mandatory and jurisdictional.' " *Houston v. Lack*, 487 U.S. at 282, 108 S.Ct. at 2388 (Scalia, J., dissenting). Not surprisingly, as the hesitant application of the exception by our own Circuit in *Butler* above suggests, the vitality of the "unique circumstances" exception—even if ultimately applied by the reviewing court—has been questioned by a number of opinions in various circuits. *Varhol*, 909 F.2d at 1562; *see, e.g., Kraus*, 899 F.2d at 1362-63; *Parke-Chapley Constr. Co. v. Cherrington*, 865 F.2d 907, 913 n. 6 (7th Cir.1989); *Smith v. Evans*, 853 F.2d 155, 160 (3d Cir. 1988); *Kropinski v. World Plan Executive Council—US*, 853 F.2d 948, 951 (D.C.Cir.1988); *Fairley v. Jones*, 824 F.2d 440, 443 (5th Cir.1987); *Sonicraft v. NLRB*, 814 F.2d 385, 387 (7th Cir.1987).

Nevertheless, the "unique circumstances" exception apparently continues to exist. The most recent Supreme Court decision to mention the doctrine is *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989). There, a unanimous Court affirmed an earlier opinion of our Circuit that had refused to entertain the appeal at issue in that case. Writing for the Court, Justice Kennedy refused to apply the "unique circumstances" exception, stating:

> After reviewing the record, we conclude that the Court of Appeals was correct in declining to apply our reasoning in *Thompson* to excuse petitioner's failure to file an effective notice of appeal. By its terms, *Thompson* applies only where a party has performed an act which, if properly done, would postpone the

> deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done. That is not the case here.

Osterneck, 489 U.S. at 179, 109 S.Ct. at 993.

Since the Supreme Court in *Osterneck* was able to deny jurisdiction by simply affirming the rationale of our Circuit's panel, the fact that the Court did not reach out explictly to overrule the "unique circumstances" doctrine is hardly a ringing re-affirmance of it. We cannot say that a majority of the Court will not in the future repudiate the *Harris Truck Line/Thompson/Wolfsohn* trilogy in an appropriate case. But we agree with the Seventh Circuit that the fact that the court in *Osterneck* chose to distinguish and "not overrule *Thompson* makes it overly bold for us to repudiate *Thompson*. Therefore, until the Supreme Court says otherwise, *Thompson* and the unique circumstances doctrine it pronounced remain good law." *Varhol*, 909 F.2d at 1562. As the Third Circuit has concluded:

> Although the scope of the "unique circumstances" rule remains murky following the Court's more recent emphasis on the mandatory nature of jurisdictional issues and the need for strict compliance with the time limitations imposed by the Rules, we are not free to sound the death knell for a rule enunciated by the Supreme Court and never retracted by it.

Kraus, 899 F.2d at 1364. Accordingly, we also must assume that the exception is still viable, and that the *Harris Truck Lines* trilogy is good law, even if its support appears to be crumbling and its rationale suspect. "[O]nly the [Supreme] Court may overrule one of its precedents. Until that occurs, [the case] is the law." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535, 103 S.Ct. 1343, 1344, 75 L.Ed.2d 260 (1983) (per curiam).

3. *Scope.*

Interestingly, there appears to be some disagreement among courts as to how broadly the "unique circumstances" exception is to be applied, particularly in light of the Supreme Court's recent emphasis on the mandatory nature of jurisdictional prerequisites. As the Third Circuit has observed:

> Some courts have construed the holding in *Thompson* strictly, requiring an explicit statement by the district court that the untimely motion was actually timely. . . . Other courts have construed *Thompson* broadly, permitting an appeal when the district court, though not specifically stating a motion was timely, acts upon the motion, *or grants an improper extension of the unwaivable time limits, thereby inducing the parties to believe the time to file a notice of appeal has been extended.*

Smith, 853 F.2d at 159 (emphasis added) (citations omitted).

The Seventh Circuit, for example, appears to take a very narrow view of the exception's applicability. Its formulation of the doctrine has increasingly emphasized reliance on affirmative "representations made by the district court while time remains for a party to file a notice of appeal, causing the party to refrain from filing an appeal prior to the expiration of the thirty-day period." *Parke-Chapley*, 865 F.2d at 914.[7] In *Green v. Bisby*, 869

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[7] In *Parke-Chapley*, the district court made certain statements within the "temporally appropriate" period, upon which the appellant claimed reliance in filing a motion under Rule 60(b). Appellant claimed the motion should have tolled the thirty-day period for filing an appeal. In examining the record, however, the appellate court ruled:

> Had the district court told plaintiff that a motion to reconsider would postpone the running of the filing period for appeals, plaintiff's argument might have merit. But given the innocuous statement of the district court and relative ease (just reading

F.2d 1070 (7th Cir.1989), a magistrate judge had entered a minute order granting the appellant's request for an extension of time to file a Rule 59(e) motion. *Green*, 869 F.2d at 1072. The Seventh Circuit, however, citing Justice Kennedy's recent formulation of the doctrine in *Osterneck* dismissed the appeal:

> The mere entry of a minute order, however, is not an act of affirmative representation by a judicial officer as contemplated by *Osterneck*.
>
> *Osterneck's* strict construction of the 'unique circumstances' doctrine may occasionally produce a harsh result when an erroneous extension has been granted. To avoid this scenario, we emphasize that district courts cannot grant extensions of time in a Rule 59(e) context.

Id.

Similarly, the Third Circuit has recognized the exception, if it exists, as being very narrow:

> We have some doubt as to whether the 'unique circumstances' exception is still viable given the strict, jurisdictional construction recently applied to the 59(e) timeliness requirement. Recent Supreme Court decisions have strictly construed the rules of procedure and prescribed time limits.
>
> . . . .
>
> Much as the Supreme Court has tended to construe procedural rules and time requirements strictly, this court has narrowly construed and sparingly applied the 'unique circumstances' exception to time requirements. . . . At all events we find no basis for appli-

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the rules of procedure) with which counsel should have determined the consequences of a FRCP 60(b) motion, any reasonable counsel simply could not have been misled.

865 F.2d at 914.

> cation of the 'unique circumstances' exception in this case: we decline to apply the 'unique circumstances' doctrine absent some express, affirmative statement by the district court that a motion is timely. No such statement can be found in this record.

Smith, 853 F.2d at 160, 161 (footnote omitted).

Other courts seem to have been more lenient in their findings of "unique circumstances." In *Fairley v. Jones*, 824 F.2d 440, Fairley, a *pro se* litigant, sought an extension within the ten days for filing his motion for a new trial. This extension was improperly granted by the magistrate judge, and Fairley filed his motion within the extended deadline. The Fifth Circuit found the case "indistinguishable from *Wolfsohn*." *Fairley*, 824 F.2d at 443. Although explicitly hesitant to apply the "unique circumstances" exception in light of the Supreme Court's emphasis on "strict compliance with filing deadlines," the court stressed that *Wolfsohn* has not been overruled, and that under that case, "the reliance of a pro se litigant, like Fairley, on the magistrate's extension of time constitutes unique circumstances justifying our exercise of jurisdiction." *Id.* at 442.

While *Fairley* above might be distinguished, since it involved a pro se litigant, our own Circuit appears to have adopted a similarly lenient formulation of the "unique circumstances" exception in *Willis* and *Butler*. Unlike the Seventh and Third Circuits' apparent focus on *affirmative* statements of the trial court—implying that a lower court's mere signing off on an extension request within the ten-day period is not sufficient to induce reasonable reliance, *see Green*—our Circuit has stated that any "judicial action" can be enough if it indicated to the appellant that his assertion of his right to appeal would be timely, "so long as the judicial action occurred prior to the expiration of the official time period such that the appellant could have given timely notice had he not been

lulled into inactivity." *Butler*, 804 F.2d at 617 (quoting *Willis*, 747 F.2d at 606) (emphasis added).[8]

C. *Application to Our Case.*

From the preceding summary, the first three steps in analyzing this case are straightforward and uncontroversial:

1) The district court was clearly without authority to grant the filing extension to Dow, and Dow's

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[8] We note, however, that *Butler* is not the last word in our Circuit concerning the "unique circumstances" exception. As mentioned earlier, it was our Circuit's panel opinion in *Osterneck v. E.T. Barwick Industries, Inc.*, 825 F.2d 1521 (11th Cir.1987) that was later affirmed by the Court in *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989). In declining to apply the exception, the panel in *Osterneck* interestingly never once cited *Butler*. The panel instead cited a Seventh Circuit case for its formulation of the doctrine, reasoning: "At no time has the district court or this court ever affirmatively represented to the Osternecks that their appeal was timely filed, nor did the Osternecks ever seek such an assurance from either court." *Osterneck*, 825 F.2d at 1528. In fact, it was after recounting this reasoning that the Supreme Court delivered its most recent characterization of the doctrine, which focuses on a party receiving "specific assurance by a judicial officer that his act has been properly done." *Osterneck*, 489 U.S. at 179, 109 S.Ct. at 993.

There is a slight tension here, since the formulation of the "unique circumstances" exception given by both our Circuit and the Supreme Court in *Osterneck* is potentially a much narrower construction than the earlier one given by our Circuit in *Willis* and *Butler*. Indeed, the Third Circuit has characterized our Circuit's opinion in *Osterneck* as one that construes the "unique circumstances" exception "strictly, requiring an explicit statement by the district court that the untimely motion was timely," and, as mentioned, has set that construction up *in direct opposition* to more lenient constructions by courts that have permitted appeals in situations identical to this one, i.e. "when the district court, though not specifically stating a motion was timely, acts upon the motion, or grants an improper extension of the unwaivable time limits, thereby inducing the parties to believe the time to file a notice of appeal has been extended." *Smith*, 853 F.2d at 159.

notice of appeal must therefore be considered untimely unless rehabilitated by the application of the "unique circumstances" exception.

2) Although eroding and narrowly construed, the exception still exists and has been applied in our Circuit.

3) Applicability of the exception to our facts turns on its scope.

Thus, at this point, we must consider the scope of the exception in a bit more detail.

Preliminarily, we note that "the power to apply a unique circumstances exception does not impose on us a requirement to do so. On the contrary, this is, at most, an equitable doctrine which enables us to consider all the relevant circumstances in deciding whether to exercise the power that we have." *Kraus*, 899 F.2d at 1365; *see also Varhol*, 909 F.2d at 1563 ("That *Thompson* is still good law does not necessarily mean that it applies in this case.").

Such an observation is important conceptually, because as with most equitable mechanisms, the real inquiry concerning the scope of the "unique circumstances" exception centers upon the *reasonableness* of the appellant's reliance on the action of the district court. Reasonable reliance has always been a necessary prerequisite to an invocation of the "unique circumstances" exception. *See Butler*, 804 F.2d at 617 ("The appellant must show its reliance on the district court action was reasonable."); *see also* 9 *Moore's Federal Practice* ¶ 204.12[2], at 4-89 (noting that "unique circumstances" rule has been held inapplicable where appellant's reliance on an erroneous action by the district court was not reasonable); 4A Wright & Miller, *Federal Practice and Procedure* § 1168, at 506 (1987) (reliance on erroneous action of district court must be reasonable to justify hearing an untimely appeal). In deciding whether to apply the exception, there-

fore, we will "look not only to whether the party or attorney actually relied on the district court's extension . . . , but also to the reasonableness of the party's conduct in its totality." *Kraus*, 899 F.2d at 1365.

For our purposes, then, the crucial jurisdictional question becomes: Was it *reasonable* for Dow to rely upon the district court's improper extension of the time for filing post-trial motions, in spite of the explicit language of Rule 6(b) prohibiting the district court from granting such an extension? When the problem is framed in this manner, we must answer "No."

First, focusing on the reasonableness of a party's reliance explains why some courts have required affirmative statements or representations from the district court before applying the "unique circumstances" exception. The more emphatic a court is in assuring a party that its filing is timely, the more reasonable it is for the party to rely on such assurances; it is then more likely that the party has been affirmatively and primarily misled by the court as to the court's authority to grant an extension.[9] Put another way, the more apparent it becomes

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[9] In fact, a formalistic inquiry that focuses on *only* the presence or absence of affirmative statements by the district court is insufficient. For example, although we believe that the "unique circumstances" doctrine should be narrowly construed, we are unwilling to suggest, like the Seventh Circuit in *Green*, that the finding of unique circumstances will depend upon a rigid definition of what constitutes an "affirmative representation." Where the court in *Green* suggested that the entry of a minute order can never be "an act of affirmative representation by a judicial officer as contemplated by *Osterneck*," 869 F.2d at 1072, we are not willing to read the requirement of "affirmative representation" so narrowly. It is possible to envision a scenario in which the entry of a minute or consent order *could* constitute an affirmative representation, if entered in response to a party's request for specific assurances from the court that its actions were timely. "Affirmative representations," in other words, must be considered in the totality of the circumstances, which includes the reasonableness of a party's conduct. *See Kraus*, 899 F.2d at 1365.

that the party's filing error stems as much from the party's own negligence in simply not reading or inquiring about the Rules, as it does from actual reliance on some action by the district court, the circumstances become far less "unique." [10]

In our case, Dow starkly admits that its counsel "inadvertently overlooked the Rule 6(b) prohibition." *Brief of Appellants* at -ix- n. 2. As the Third Circuit ruled quite recently in a similar case:

> Here [counsel's] misreading or *unawareness* of the time computation principles set forth in Rule 6(a) contributed to his failure to file a timely notice of appeal. The unique circumstances doctrine has never been extended to an attorney's miscalculation of the applicable time limits, and we see no reason to do so here even if the trial judge also shared that incorrect assumption.

Kraus, 899 F.2d at 1365-66 (emphasis added) (footnote omitted); *see also Certain Underwriters at Lloyds of London v. Evans*, 896 F.2d 1255, 1257-58 (10th Cir.1990) (where district court improperly enlarged time for filing

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[10] Indeed, on at least one occasion, an attorney actually *discovered* through research the day after the event that the trial judge had no authority to grant an extension for filing a post-trial motion, and yet in good faith refused to come forward with such knowledge. Although the attorney could have filed the motion within the proper time period, he read—or misread—a prior case articulating the exception to mean that a district court could extend the deadline despite the strictures of the Rules.

In issuing a writ of mandamus vacating the trial court's improper grant of a new trial, the Seventh Circuit emphasized that there is "an equitable exception to the rigid time limitation when a lawyer, not knowing the law, *actually* relies on the affirmative misstatement of the district judge." *Bailey v. Sharp*, 782 F.2d 1366, 1368 (7th Cir.1986). The *Bailey* Court, however, refused to apply the exception, because "it [was] clear that it was not the judge's misstatement but counsel's misreading of the law that led to his failure to file on time." *Id.*

a notice of appeal in excess of jurisdictional limits imposed by the appellate rules, appellant could not claim reasonable reliance in light of his "duty to familiarize himself with the appellate rules"; appellant "either knew or should have known" that district court had exceeded maximum allowable extension under App.Rule 4(a)(5)); *Parke-Chapley*, 865 F.2d at 914 (noting that in part due to "relative ease (just reading the rules of procedure)" with which counsel should have determined consequences of a FRCP 60(b) motion, "any reasonable counsel simply could not have been misled" by trial court's statement); *United States v. Hill*, 826 F.2d 507, 508 (7th Cir.1987) ("The Supreme Court has not held or even hinted that a defendant's own neglect, or that of his lawyer, extends a jurisdictional time limit.").[11]

In light of the mandatory and jurisdictional nature of the filing rules in this case, and the drift of recent Su-

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[11] If we were dealing with the mistakes of a pro se litigant, such as in *Fairley, Derks v. Dugger*, 835 F.2d 778 (11th Cir.1987), or *Inglese*, the justification for applying the "unique circumstances" exceptions would become at least more compelling because pro se litigants are arguably not charged with as much responsibility in following the filing rules. That, however, is not the situation before us. Dow was represented by competent and able counsel.

In *Reed v. Kroger Co.*, 478 F.2d 1268 (Temp.Emer.Ct.App.1973), the court considered a more blatant case of a lawyer's failure to file a notice of appeal within the jurisdictional deadline. There, in seeking to invoke the "unique circumstances" exception, counsel claimed that his reliance on the oral advice of a district court clerk excused his unfamiliarity with local practice, and that his 100-day belated filing of his notice of appeal should nonetheless stand as valid. In dismissing the appeal, the court stated its strong belief that "professional standards require counsel to be familiar with, or to make at least a reasonable effort to learn, the rules of the courts in which they practice. . . . unfamiliarity with local practice does not even constitute 'excusable neglect,' let alone satisfy the higher standard recognized by the Supreme Court [for 'unique circumstances']." *Reed*, 478 F.2d at 1271-72. We believe that the *Reed* court's admonition applies with at least equal force here; at the minimum, attorneys should be charged with knowledge of the Federal Rules of Civil Procedure.

preme Court decisions reiterating the rules' strictness, it simply does not appear on this record that there are "unique circumstances" present to justify applying what is supposed to be a narrowly construed equitable exception. Equitable mechanisms do not exist merely to rehabilitate attorney oversight or inadvertence. The reasonableness of Dow's reliance on the action of the district court is severely undercut by the ease with which it could have read Rule 6(b). Simply scanning the Rule would have provided notice that there was an inconsistency between the Rule's text and the court's consent order.[12]

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[12] Our decision in *Butler* is distinguishable and does not mandate a contrary result in this case. Unlike the instant matter, *Butler* did not involve a simple grant of a filing extension by the district court. There, within the ten-day time limit, the appellant *did file* a timely new trial motion, along with an accompanying request to file a supporting memorandum containing grounds for the motion. The district court then granted an extension of time for the appellant to file the supporting memorandum. Appellee argued that the motion filed within the ten-day period was nothing more than a motion for an extension of the filing time for a new trial motion, and if this were the case, that the district court had no authority to enlarge the time for filing such a motion under Fed.R.Civ.P. 6(b). Nevertheless, we evidently did not accept such a characterization, for we found the appellant's reliance in that case to be reasonable "because [appellant] filed *a timely motion which appeared to be a valid new trial motion.* Thus, although its amended motion for new trial might have been technically untimely, the fact that some action was taken within 10 days of the judgment distinguishes this case." *Butler*, 804 F.2d at 617 (emphasis added).

The distinction is important. In the case at bar, although Dow did take "some action" within the ten-day period, the extension for which it asked was *clearly* impermissible under Rule 6(b), and Dow reasonably should have known this. The difference between *Butler* and our case is the attempt by the *Butler* appellant to accommodate Rules 6(b) and 59. In other words, a timely filed but insufficient Rule 59 motion can perhaps become sufficient if the subsequent actions of the district court indicate that there is no problem; in equitable terms, there has been a good-faith attempt at nominal compliance, and the parties have no notice of their mis-

Because we find that Dow did not reasonably rely on the district court's consent orders, and thus does not fall within the "unique circumstances" exception, we must decline jurisdiction over this appeal. Although we acknowledge that "*Osterneck's* strict construction of the 'unique circumstances' doctrine may occasionally produce a harsh result when an erroneous extension has been granted," *Green*, 869 F.2d at 1072, the Supreme Court itself has indicted that it is increasingly willing to tolerate "harsh" results for failure to comply with jurisdictional prerequisites mandated by the legislature through the drafting of the Federal Rules.[13] Further, to hold otherwise in this case would render the plain, mandatory language of Rule 6(b) a nullity.[14]

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take. Dow in our case cannot make the same argument if they never once glanced at Rule 6(b)—it would have had immediate notice that its request for an explicit enlargement of the filing deadline could not have been granted.

[13] In *U.S. v. Locke*, the Court observed that "[f]iling deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced." 471 U.S. 84, 101, 105 S.Ct. 1785, 1796, 85 L.Ed.2d 64 (1985).

[14] Judge Easterbrook, concurring in *Bailey v. Sharp*, 782 F.2d at 1371, essentially suggests that the express prohibition of extension of time under Rule 6(b) should *always* preclude arguments of reasonable reliance on erroneous district court action:

> Rule 6(b) vitiates explicit orders extending the time. The order cannot control just because people may rely on it; Rule 6(b) says that they may not rely. Unless every effort to extend the time is a 'special circumstance' justifying the extension—in which event Rule 6(b) is a dead letter, each violation is a self-fulfilling prophecy—the district court's order . . . had no effect. The rules were designed to be applied mechanically, and that design binds us.
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> . . . .
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> It is too easy for a litigant to say that he 'relied' on a mistaken decision by a judge to grant more time than the rules

The district court's jurisdiction ran out after ten days, and it was powerless either to give either party more time, or to grant a new trial on its own motion. Absent unique circumstances, a "court without jurisdiction is a court without power, not matter how appealing the case for exceptions may be." *Bailey*, 782 F.2d at 1373 (citing *Professional Managers' Ass'n v. United States*, 761 F.2d 740 (D.C.Cir.1985) (Easterbrook, J., concurring). Consequently, we too lack the power to hear this case on the merits.

III. *Conclusion.*

For the foregoing reasons, the appeal is DISMISSED.

JOHNSON, Circuit Judge, dissenting:

The majority has concluded that the unique circumstances doctrine is viable and binding upon this Court. With this conclusion, I, of course, agree. The majority,

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allow. Rule 6 means that one may *not* rely on this sort of decision.

Id. at 1371-72 (Easterbrook, J., concurring) (emphasis in original) (citations omitted); *see also Varhol*, 909 F.2d at 1575 (Manion, J., concurring) ("[A] lawyer who . . . reads the federal rules cannot actually rely on the [trial court's] misstatement because he knows (or should know) the judge is wrong.").

Because Judge Easterbrook was attacking the viability of the "unique circumstances" exception itself, his position is necessarily broader than the one we adopt today. As mentioned earlier, the exception, until explicitly overruled by the Supreme Court, continues to exist, and we will continue to apply it in truly unique cases "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." *Osterneck*, 489 U.S. at 179, 109 S.Ct. at 993. In this case, for example, if Dow had read Rule 6(b), had inquired of the district court whether it possessed the power, in spite of the limitations of the Rules, to grant an extension, and had received the extension with "specific assurances" from the court that timeliness would not be a concern, then the case for applying the exception would be far more compelling.

however, has concluded that this doctrine does not apply to the case at bar. With this conclusion, I cannot agree.

The majority conducts a thorough and exhaustive discussion of the case law interpreting the unique circumstances doctrine. At the end of this discussion, the majority frames the test as an analysis of whether it was "reasonable for Dow to rely upon the district court's improper extension" of the relevant time limits. (emphasis deleted).

Initially, I note that the majority correctly holds, in the text of its opinion, that our Circuit, unlike he Seventh and Third Circuits, has never required an affirmative oral or written statement from the district court assuring the appellant that his or her filing was adequate. The majority notes that our Circuit's case law supports the notion that judicial action by the district court, such as the grant of a motion, may be sufficient to invoke the doctrine. Our Circuit's case law is well founded in that the Supreme Court has specifically allowed judicial action by the district court, without any contemporaneous oral or written assurances, to be sufficient to constitue a basis for invoking the unique circumstances doctrine. *See Wolfsohn v. Harkin*, 376 U.S. 203, 84 S.Ct. 699, 11 L.Ed.2d 636 (1964) (per curiam). The majority, however, tempers its reading of our case law in its footnote 8 and in its application of the test in section C of its opinion.

In footnote 8, the majority implies that language found in *Osterneck v. E.T. Barwick Industries, Inc.*, 825 F.2d 1521, 1528 (11th Cir.), *aff'd sub nom. Osterneck v. Ernst & Whinney*, 489 U.S. 169, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989) suggests a shift in the requirements of the doctrine. The Eleventh Circuit decision in *Osterneck* stated that no judicial officer affirmatively represented or assured the appellant that the filing was timely. *Osterneck*, 825 F.2d at 1528. The Supreme Court adopted similar language in its affirmance of our Court's decision. *See*

Osterneck, 489 U.S. at 179, 109 S.Ct. at 993. However, contrary to the implications of the majority's footnote 8, there is no reason to imply that either our Court or the Supreme Court has imposed a requirement that appellants wishing to invoke the doctrine must point to a specific oral or written statement by the district court assuring the party that the filings complied with all the relevant procedures. The appellant in *Osterneck* could not point to *any* judicial action or statement that caused it to delay the filing of its notice of appeal. *Osterneck*, 825 F.2d at 1529. The majority's implied reading of *Osterneck* in fact *sub silentio* overrules both *Butler v. Coral Volkswagen, Inc.*, 804 F.2d 612 (11th Cir.1986), and *Wolfsohn, supra*, since both of these cases allowed judicial actions, without any contemporaneous judicial statements, to constitute a unique circumstance.[1] Absent an express statement by the later courts overruling the prior precedent, we should attempt to read the opinions as being consistent with each other. The two opinions are consistent if we recognize that a judicial action, such as the approval of an order, can constitute an affirmative representation by the court.

While the majority, in the formulation of its test, acknowledges that judicial action, without more, is sufficient to invoke the doctrine, the majority, in the application of its test, places significant stock in the district court's failure to make any "emphatic" assurances. The majority concludes that absent any such assurances, it becomes "apparent . . . that the party's filing error stems as much from the party's own negligence." The majority holds that in such a case, the doctrine is inapplicable. Essentially the majority's opinion can be fairly read as

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[1] It would be illogical to view the panel opinion in *Osterneck* as overruling *Butler* because panels lack that power, *see United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir.1986). Moreover, these cases were decided only eleven months apart and two members of the *Butler* panel sat on the *Osterneck* panel.

holding that if the litigant is not pro se (*see* majority's note 11) and if the court does not make any "emphatic" assurances then the litigant will be presumed not to have established the existence of unique circumstances. This is not the law of our Circuit. In *Butler* we found unique circumstances and in *Wolfsohn* the Supreme Court found unique circumstances despite the fact that in both cases the appellants were presumably represented by able counsel and despite the fact that the district courts only signed an order in the two cases and did not assure counsel that the orders were timely filed.

The majority's opinion is a departure from the law of our Circuit in one other significant way. The majority presumes that, with the exception of cases involving pro se litigants and cases where the district court emphatically assures the litigants, litigants who rely upon judicial actions will be unable to prove the reasonableness of their reliance. The majority reasons that most parties could have avoided the situation in the first place by simply reading the rules.[2] While it is true that if Dow had properly read the rules it would not be in the present predicament, the same is true of *every* litigant who seeks to invoke the unique circumstances doctrine. By presuming that the actions of the parties were unreasonable for failing to read the rules, the majority has invoked a presumption which significantly narrows the application of the doctrine.

The majority narrows the doctrine because it confuses the reasonableness of the appellants in filing the initial motion for an extension of time with the reasonableness of the appellants in relying upon the district court's

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[2] The majority does not explain why a party's reliance becomes more reasonable when the district court is more emphatic. If a party is to be held to the rules when the judge signs an order it is unclear why a party should be excused from the rules when the party relies upon an informal oral representation from a filing clerk. *See Willis v. Newsome*, 747 F.2d 605 (11th Cir.1984).

granting this motion. While it is clear that filing the motion for an extension of time, in direct contravention of Fed.R.Civ.P. 6(b), was negligent, it is less clear that relying on the district court's grant of this motion was negligent. Our Circuit, in *Butler v. Coral Volkswagen, Inc., supra*, noted that the two questions are in fact separate and that only the second question is relevant to the unique circumstances doctrine. *See Butler*, 804 F.2d at 615 n. 5 & 617. The focus of the unique circumstances doctrine is on why the appellant failed to timely file his notice of appeal, not on why the appellant thought he or she could file the underlying motion. In *Butler*, while we condemned the appellant's actions in filing a motion requesting an extension of time and we condemned the district court's grant of the motion, we held reasonable the appellant's reliance upon the district court's actions.[3] As we held in *Butler*, "if [the appellant's] motion had been dismissed [by the district court] as it should have been, [the appellant] would have had plenty of time to perfect its appeal. As in *Willis*, appellant here was 'lulled into inactivity' by the action of the district court." *Butler*, 804 F.2d at 617 (quoting *Willis v. Newsome*, 747 F.2d 605, 606 (11th Cir.1984)). Contrary to the majority's presumption of unreasonableness in the case at bar, the

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[3] The majority's error in confusing the reasonableness of moving for an extension of time with the reasonableness of relying upon a district court order mistakenly leads it to distinguish *Butler* from the case at hand. The majority compares the papers filed by Coral Volkswagen in *Butler* to the papers filed by Dow in the case at hand. *See* majority note 12. The distinctions between the motions are irrelevant. What is relevant is that the district court mistakenly granted the appellant an extension of time to file a new trial motion, and while the untimely motion was pending, the time to file a notice of appeal expired because no valid new trial motion stayed the time to file the appeal. Viewed through this lens, *Butler* is "on all fours" with the case at bar. If the question before our Court is whether it was reasonable to file the initial motion asking for an extension, *Butler* would be distinguishable. But, regardless of what was filed, if the question is whether it was reasonable for the appellant to rely upon the judge's actions, then *Butler* is indistinguishable.

Butler panel adopted an opposite presumption. The *Butler* court held reasonable the reliance on the judicial action and stated that "[n]otwithstanding these breaches of the Federal Rules of Civil Procedure . . . we are *required* by Supreme Court precedent to allow the appeal under the 'unique circumstances' doctrine." *Butler*, 804 F.2d at 617 (emphasis added); *compare id. with* majority opinion at 1532 ("the power to apply a unique circumstances exception does not impose on us a requirement to do so").

The proper test for whether the unique circumstances doctrine should be applied to the case at bar is found in *Willis v. Newsome* where we wrote:

> Courts will permit an appellant to maintain an otherwise untimely appeal in unique circumstances in which the appellant reasonably and in good faith relied upon judicial action that indicated to the appellant that his assertion of his right to appeal would be timely, so long as the judicial action occurred prior to the expiration of the official time period such that the appellant could have given timely notice had he not been lulled into inactivity.

Willis, 747 F.2d at 606. It is undisputed that (1) the judicial action indicated that appellant's right to appeal notice would be timely and (2) the judicial action occurred when appellant could still timely file the notice. What is disputed is whether appellant "reasonably and in good faith" relied upon the judicial action. I believe that appellant's reliance was both reasonable and in good faith. There is no indication that Dow was aware that the district court lacked the power to grant the motion for an extension of time to file the new trial motion. More importantly, Dow could easily have submitted a timely notice of appeal if it was aware of the proper deadlines, and Dow's delay gained it little.

While I am aware that certain jurists believe the equitable doctrine of unique circumstances is a questionable

doctrine and therefore ought to be narrowed, this is not the case for such narrowing. The majority's decision that Dow acted unreasonably creates a large windfall for the Pinions. Unlike other cases, such as *Butler*,[4] the Pinions' hands are far from clean. In the case at bar, the Pinions and Dow entered a consent agreement, later ratified by the court, allowing Dow to file an untimely new trial motion. Now, with a $2.45 million judgment at stake, the Pinions are in the unseemly position of attacking that consent agreement. It is not proper to manipulate this equitable doctrine to benefit the Pinions in contravention of the basic principle of equity that "he [or she] who comes into equity must come with clean hands." *New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc.*, 291 F.2d 471, 473 (5th Cir.1961).

Finally, I am concerned about the implication of the majority's holding. In the case at hand, a motion was placed before the district court and the court ruled on that motion by issuing an order. The majority finds that we lack jurisdiction because it was unreasonable for Dow to rely upon this order. Whether or not an order is correct, it is still binding upon the parties as the law of the case until an appellate court reviews that order. It seems to be, at the very least, bad policy for appellate courts to instruct litigants not to rely upon district court orders. Though I do not intend to point out a parade of horribles, the majority's holding encourages parties to second guess district courts and file needless notices of appeals even when the parties do not suspect that the district court is in error.

I therefore would find jurisdiction, and I believe we should proceed to the merits.

---

[4] In *Butler*, the appellees promptly objected to the district court's order granting the appellants an extension of time in which to file the motion for a new trial. The appellees protested that the district court lacked the power to grant the extension of time. *See Butler*, 804 F.2d at 613.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Civil Action File No. 4:88-CV-0261-HLM

MR. and MRS. JESSE PINION and
MAURICE and SHIRLEY DAFFRON,
Plaintiffs,

v.

DOW CHEMICAL U.S.A.,
Defendant.

EXCERPTS FROM TRIAL TRANSCRIPT
REFLECTING ORDER BY THE UNITED STATES
DISTRICT JUDGE ISSUED ORALLY ON
JANUARY 26, 1990

* * * *

MR. COCKRILL: On the J.N.O.V. motions, those are normally due in ten days. Is there any way we can get an extension? We're scheduled to go to trial a week from Monday.

THE COURT: I have no problem. Mr. Cook?

MR. COOK: No, Your Honor.

MR. COCKRILL: If we could have thirty days to submit those, that would help us.

THE COURT: Well, you certainly may, unless there is objections to the thirty days.

MR. COOK: No, no.

THE COURT: Do you have time to send the Court an Order giving you the extension?

MR. COCKRILL: Sure.

THE COURT: If you will do that, I'll enter it and take care of you.

MR. COCKRILL: I'll make it thirty days from today.

THE COURT: Yes, sir.

MR. COCKRILL: Thank you.

THE COURT: Is that just for the J.N.O.V.?

MR. COCKRILL: It will be a Rule 50 motion, probably alternatively for a new trial, but we need to take a look at the situation, obviously. On behalf of all of us, thank you for the courtesies you have extended in coming to your courtroom.

MR. COOK: Likewise from our side. As usual, we appreciate your courtesy.

THE COURT: It's a pleasure to try a case with outstanding lawyers and the Court appreciates all the courtesy of all of your people in this trial. Have a good weekend. We'll be in recess.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Civil Action File No. 4:88-CV-0261-HLM

MR. and MRS. JESSIE PINION and
MAURICE and SHIRLEY DAFFRON,
Plaintiffs,

v.

DOW CHEMICAL U.S.A.,
Defendant.

CONSENT ORDER

[Filed Feb. 23, 1990]

As agreed by the parties, it is hereby ordered that the defendant, Dow Chemical U.S.A., shall have an additional ten (10) days up to and including March 8, 1990, to file any and all post-trial motions pursuant to Rule 50 of the Federal Rules of Civil Procedure.

It is so ordered this 20th day of February, 1990.

/s/ Harold L. Murphy
HAROLD L. MURPHY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Civil Action File No. 4:88-CV-0261-HLM

MR. and MRS. JESSIE PINION and
MAURICE and SHIRLEY DAFFRON,
Plaintiff,

v.

DOW CHEMICAL U.S.A.,
Defendants.

CONSENT ORDER

[Filed Jan. 31, 1990]

As agreed by the parties on Friday, January 26, 1990, it is hereby ordered that the defendant, Dow Chemical U.S.A., shall have thirty (30) days up to and including Monday, February 26, 1990 to file any and all post-trial motions pursuant to Rule 50 of the Federal Rules of Civil Procedure.

It is so ordered this 30th day of January, 1990.

/s/ Harold L. Murphy
HAROLD L. MURPHY
United States District Judge

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8508

MR. JESSE PINION, MRS. JESSE PINION,
Plaintiffs-Appellees,

MAURICE DAFFRON, SHIRLEY DAFFRON,
Plaintiffs,

versus

DOW CHEMICAL, U.S.A.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Georgia

[Filed Jun. 27, 1991]

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion April 19, 1991, 11th Cir., 19—, —— F.2d ——).

Before: FAY and JOHNSON, Circuit Judges, and PECK*, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court

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* Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

June 26, 1990

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 90-8508 Pinion v. Dow Chemical, U.S.A.
DC DKT NO.: 88-00261 4-CV-HLM

NOTICE OF APPEAL FILED: May 25, 1990

The referenced case has been docketed in this court. Please use the appellate docket number noted above when making inquiries. The court expects compliance with all appellate deadlines and urges counsel to arrange their schedules to preclude conflicts and minimize delay. An appeal may be dismissed for failure to timely comply with the Federal Rules of Appellate Procedure and the rules of this court.

After review of the district court docket entries, order, and/or judgment, and the notice of appeal, it is not clear whether this court has jurisdiction over this appeal. If it is determined that this court is without jurisdiction, this appeal will be dismissed. THE PARTIES ARE REQUESTED TO ADDRESS THE ATTACHED JURISDICTIONAL QUESTION(S) IN THEIR BRIEFS ON THE MERITS.

Fed.R.App.P. 10(b) requires appellant to order any transcript required within ten days of filing a notice of appeal. For this purpose, an Appeal Information Sheet is

available from the district court clerk. Appellant is required to serve a copy of page 1 of the Appeal Information Sheet (AIS) on all parties and the clerks of this court and the district court when it is delivered to the court reporter. Trial exhibits are not ordinarily transmitted to this court. [*See* 11th Cir. R. 11-3].

Counsel participating in this appeal should complete and return the enclosed appearance form within fourteen days. [11th Cir. R. 46-1]. Only counsel who enter an appearance will be noted on the docket. Persons appearing pro se need not file an appearance form.

Sincerely,

/s/ Miguel J. Cortez
MIGUEL J. CORTEZ
Clerk

Reply To: Wendi Mason (404) 331-3836

c: District Court Clerk

No. 90-8508

JURISDICTIONAL QUESTION(S)

(1) Whether the district court lacked jurisdiction to extend the time to file post-trial motions pursuant to Fed.R.Civ.P. 50 and 59 even though the parties consented to the extension? *See* Fed.R.Civ.P.6(b).

(2) Even if the district court lacked jurisdiction, whether the notice of appeal is nevertheless effective? *See Inglese v. Warden*, 687 F.2d 362 (11th Cir. 1982).

(2)

No. 91-511

In The

Supreme Court of the United States

October Term, 1991

DOW CHEMICAL, USA,

Petitioner,

v.

MR. & MRS. JESSE PINION,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF MR. & MRS. JESSE PINION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondents

Dated: October 23, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Court of Appeals correctly dismissed Petitioner's appeal for lack of jurisdiction, holding that the failure of Petitioner's trial counsel to read the rules which prohibit extensions of time to file post trial motions was unreasonable and could not serve as a basis for invoking the unique circumstances exception to the mandatory and jurisdictional time limits for perfecting the filing of an appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 91-511

In The

Supreme Court of the United States

October Term, 1991

DOW CHEMICAL, USA,

Petitioner,

v.

MR. & MRS. JESSE PINION,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF MR. & MRS. JESSE PINION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondents Mr. and Mrs. Jesse Pinion respectfully request that this Court deny the Petition for a Writ of Certiorari, which seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit dismissing Petitioner's appeal for lack of jurisdiction.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Pinion v. Dow Chemical,*

U.S.A., 928 F.2d 1522 (11th Cir. 1991), and is set forth in Petitioner's Appendix at pages 1a-32a.

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals was issued on April 19, 1991. Rehearing and suggestion for rehearing en banc was denied on June 27, 1991. Petitioner purports to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On January 29, 1990, a jury verdict was returned in favor of Respondents, Mr. and Mrs. Jesse Pinion, in the amount of Two Million Four Hundred Fifty Thousand Dollars as a consequence of Petitioner's contamination of the groundwater beneath the Pinion farm near Dalton, Georgia.[1] At trial Petitioner admitted the contamination emanated from its latex manufacturing facility which adjoins Respondents' property.

Following the dismissal of the trial jury, trial counsel for Petitioner requested an extension of thirty days within which to file motions for judgment notwithstanding the verdict ("JNOV") and a new trial. Counsel for Respondents offered no objection, and two days later the

[1] The jury verdict consisted of Four Hundred Fifty Thousand Dollars in compensatory damages, and Two Million Dollars in punitive damages.

district court entered a consent order granting the requested extension. On February 23, 1990, a second consent order was entered, at the request of counsel for Petitioner, further extending the filing deadline to March 10, 1990.[2] Petitioner filed a motion for JNOV, or alternatively for a new trial, on March 8, 1990. The motion was denied on May 5, 1990. Petitioner filed its notice of appeal on May 25, 1990.

In a memorandum dated June 26, 1990, the Eleventh Circuit *sua sponte* questioned its jurisdiction over the appeal, and requested that the parties address the jurisdictional issue in their briefs on the merits. Oral argument was heard in this matter on January 30, 1991. On April 19, 1991, the Eleventh Circuit dismissed the appeal. *Pinion v. Dow Chemical, U.S.A.*, 928 F.2d 1522 (11th Cir. 1991). The Court denied rehearing and suggestion for rehearing en banc on June 27, 1991.

SUMMARY OF THE ARGUMENT

The record in this case presents an obvious, although inadvertent, failure by Petitioner's trial counsel to adequately familiarize themselves, and comply, with certain mandatory and jurisdictional requirements of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. This failure occasioned their request of the district court to extend the time within which to file post-trial motions, as well as their subsequent reliance

[2] The consent orders appear in Petitioner's Appendix at 35a-36a.

upon that extension to toll the time within which to file a notice of appeal. Those actions were unreasonable, and do not constitute a sufficient basis for application of the narrow "unique circumstances" doctrine as announced in *Wolfsohn v. Hankin*, 376 U.S. 203 (1964).

The Court of Appeals correctly interpreted that equitable doctrine, and declined jurisdiction over the appeal. Summary reversal is not warranted.

There is no substantial conflict among the circuits concerning the unique circumstances doctrine, and plenary review is not warranted here as the correct result was reached below.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE ELEVENTH CIRCUIT DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *WOLFSOHN V. HANKIN*

The Petition for Writ of Certiorari asserts that the decision of the Eleventh Circuit "directly conflicts" with this Court's decision in *Wolfsohn v. Hankin, supra*. To the contrary, the decision below specifically acknowledges the so-called "unique circumstances" rule, and reaffirms the obligation of that court to apply Supreme Court precedent. *See* 928 F.2d at 1530. What Petitioner apparently fails to comprehend is that recognition of an equitable doctrine does not impose a requirement that it be applied in all circumstances.

The unique circumstances exception to the mandatory and jurisdictional filing requirements of the Federal

Rules of Civil Procedure emerged from a trilogy of cases in the early 1960's. *See Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam); *Thompson v. I.N.S.*, 375 U.S. 384 (1964) (per curiam); *Wolfsohn v. Hankin, supra.* In the years following the aforesaid decisions, no case decided by this Court has followed that precedent.

To the contrary, in the intervening period this Court has rigorously imposed a restrictive view of the power of a district court to expand the period of time within which a litigant must perform a mandatory jurisdictional act. *See Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (per curiam); *United States v. Locke*, 471 U.S. 84 (1985). Indeed, four members of this Court have specifically stated that "Our later cases . . . effectively repudiate the *Harris Truck Line* approach, affirming that the timely filing of a notice of appeal is 'mandatory and jurisdictional.' " *Houston v. Lack*, 487 U.S. 266, 282 (1988) (Scalia, J., dissenting joined by Rehnquist, C. J., O'Conner, J., and Kennedy, J.) (quoting *Griggs*, 459 U.S. at 58).[3]

A careful review of the circumstances attending *Wolfsohn*, the decision of this Court which Petitioner asserts to be "most similar" to the instant factual situation, offers subtle but significant distinctions which render the cases quite distinguishable. As recited in the Statement of the Case contained in the Petition for a Writ of Certiorari to

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[3] The majority in *Houston v. Lack, supra*, did not address the "unique circumstance" exception.

the United States Court of Appeals for the District of Columbia Circuit filed in this Court on December 17, 1963, the petitioner in *Wolfsohn* filed a motion to extend the time either to move to vacate or ask for rehearing some four days after the entry of summary judgment against her. Her counsel was hospitalized at the time, recovering from an illness involving surgery.[4] The extension prayed for was granted, and the petitioner subsequently filed her Rule 59 motion within the expanded time period set by the district court. In its brief per curiam decision, this Court reversed the decision of the D. C. Circuit to dismiss the appeal for lack of jurisdiction.[5]

Petitioner here can offer no such compelling circumstances to warrant application of an equitable doctrine. There was no illness or hospitalization of counsel, only the stark admission by Petitioner that its trial counsel "inadvertently overlooked the Rule 6(b) prohibition." *See* 928 F.2d at 1524, n.2.

Stated simply, counsel for Petitioner did not know, misread, or ignored the applicable rules regarding the filing of its notice of appeal. Such an unawareness or misreading of the time computation principals by counsel

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[4] *See* Petition for Writ of Certiorari, at 4-5, 10, *Wolfsohn v. Hankin, supra* (October Term, 1963, Case No. 680).

[5] Justice Clark, joined by Justices Harlan, Stewart and White, vigorously dissented to the majority's reversal, noting that the trio of "unique circumstances" cases was subverting unambiguous mandates of the Congress in imposing specific filing deadlines. *Wolfsohn, supra,* 376 U.S. at 203.

has never been the basis upon which to apply the unique circumstances doctrine,[6] and properly should not be so here. Filing deadlines, if they are to have content, must be rigorously enforced. *United States v. Locke, supra* at 100-101.

II. THERE IS NO SUBSTANTIAL CONFLICT IN THE CIRCUITS REGARDING THE SCOPE OF THE UNIQUE CIRCUMSTANCES DOCTRINE.

Much as this Court has tended to strictly construe procedural rules and filing requirements, the various circuit courts have narrowly interpreted and sparingly applied the unique circumstances exception. While there are, no doubt, varying verbal formulations defining the availability of the exception, there is not sufficient conflict among the circuits to warrant the grant of certiorari and the Court's attention here. Each of the circuit courts considering application of this equitable doctrine has accepted its continuing vitality, and has evaluated all attendant relevant circumstances in determining whether exercise of the exception was warranted.

Petitioner seeks to establish conflict among the circuits by pointing to various decisions, contending that the Third, Seventh, Ninth and Eleventh Circuits[7] apply a differing, more rigorous standard for "triggering" the

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[6] *See Kraus v. Consolidated Rail Corp.*, 899 F.2d 1360, 1365-66 (3rd Cir. 1990).

[7] *See, e.g., Kraus v. Consolidated Rail Corp., supra; Green v. Bisby*, 869 F.2d 1070 (7th Cir. 1989); *In re Slimick*, 928 F.2d 304 (9th Cir. 1990); *Pinion v. Dow Chemical, U.S.A., supra.*

exception than that of the Fifth and D.C. Circuits. To the contrary, each circuit court decision cited in the Petition for Certiorari evidences careful review of the exception, the scope thereof, and application to the particular factual situation attending the case.

The attempt to contrast *Fairley v. Jones*, 824 F.2d 440 (5th Cir. 1987) fails upon careful examination. *Fairley*, cited by Petitioner as a decision "still adher(ing) to the doctrine as originally spelled out in *Harris Truck*, *Thompson* and *Wolfsohn*," is not only readily distinguishable on its facts, but evidences a remarkable underlying similarity of reasoning to that of the Eleventh Circuit below. *Fairley* involved a *pro se* litigant, a situation quite contrary to that of Petitioner. Clearly, equitable considerations would favor a more lenient formulation of the doctrine in the absence of counsel.

Yet even more significant, the Fifth Circuit imposes precisely the same criteria for justifying application of the unique circumstances exception as that utilized by the Eleventh Circuit below: A consideration of the reasonableness of the reliance on the District Court's action. *Fairley*, at 442-443; *Pinion*, at 1532-1534.

Aviation Enterprises, Inc. v. Orr, 716 F.2d 1403 (D.C.Cir. 1983) likewise fails to evidence a genuine conflict among the Circuits. There, the D.C. Circuit considered circumstances where the district court vacated a prior order and simultaneously issued a superseding order, from which a new 60-day period for filing a notice of appeal ostensibly commenced to run. The notice of appeal was properly filed within the new 60-day period, but outside the 60-day period that would have run from the initial order.

Although the court specifically left undecided which 60-day period was operative, *dicta* contained in a footnote to the decision states that the delay would not "have been fatal" in any event due to the unique circumstances exception. *Aviation Enterprises, Inc. v. Orr*, at 1406, n. 25.

Neither decision can hardly provide a sufficient basis for Petitioner to boldly allege that "Dow's appeal would undoubtedly have been deemed timely under the Fifth and D.C. Circuits' rules . . . " Such a speculative statement does not fairly frame the factual situation attendant here, nor the circuit court cases considering the unique circumstances exception.

The decision below is a correct one, thoughtfully considering the scope of the unique circumstances exception. As interpreted by the Eleventh Circuit, the exception is available only upon a showing of *reasonable reliance* upon the action of the district court. Careful review of the decisions of the various circuits evidences the commonality of that requirement, not a conflict as suggested by Petitioner. This case does not present circumstances where one circuit court of appeals has rendered a decision in conflict with another, and certiorari should be denied.

III. THERE IS NO NEED FOR PLENARY REVIEW OF THE UNIQUE CIRCUMSTANCES EXCEPTION

As is summarized above, the circuit courts continue to recognize the existence of the unique circumstances doctrine, while narrowly applying the exception in light of several recent decisions of this Court reiterating the "harsh" consequences for litigants who fail to comply

with jurisdictional prerequisites mandated by the legislature. Plenary review of the decision below is not needed, and it would not seem an appropriate use of scant judicial resources to accept certiorari in a matter which has been correctly decided.

The continuing vitality of the doctrine has indeed been questioned both at the circuit level and by members of this Court.[8] There has not been, however, a *"de facto* overruling" as suggested by Petitioner, nor is there need to "reconcile" Justice Scalia's dissent in *Houston* with the writing of Justice Kennedy in *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989). Quite to the contrary of that stated in the Petition for Certiorari, there was no "reliance on the 'unique circumstances' doctrine in *Osterneck*." (Petition for Certiorari, page 11). This Court unanimously and unequivocally concluded the decision of the Eleventh Circuit was correct, and that the petitioners in that case were not entitled to have the appeal heard on the basis of unique circumstances. *Osterneck*, 489 U.S. at 178. It is, simply, incorrect to suggest that this Court relied on the exception in that decision.

The lower courts are constrained to apply the doctrine until retracted by this Court. This case, correctly decided below, is not the appropriate vehicle for such retraction.

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[8] *Houston v. Lack, supra.*

CONCLUSION

The decision of the United States Court of Appeals for the Eleventh Circuit is imminently correct and presents none of the special and important considerations favoring review by this court on certiorari.

The unique circumstances doctrine, founded in equity, does not exist to rehabilitate attorney oversight or inadvertence. Petitioner here unreasonably relied to its detriment that the district court order granting it additional time within which to file post-trial motions in the district court would further operate to toll the time for filing its notice of appeal. It received no specific judicial assurance of that fact, and failed to examine the applicable rule to observe the inherent inconsistency between the text of the rule and the court's order. The Petition for Certiorari offers no compelling reasons to disturb the judgment of the Court of Appeals.

For these reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Dated October 23, 1991

(3)

No. 91-511

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DOW CHEMICAL, USA,
Petitioner,

v.

MR. & MRS. JESSE PINION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Dated: November 1, 1991

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TABLE OF CONTENTS

* There have been no changes in the parties to the proceedings listed on pages ii-x of the petition.

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-511

DOW CHEMICAL, USA,
Petitioner,

v.

MR. & MRS. JESSE PINION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondents pay lip service to the "equitable doctrine" in *Wolfsohn* v. *Hankin*, 376 U.S. 203 (1964), but never address the "unseemly" fact that they come without "clean hands," having consented to the time extension they now attack in order to preserve a $2.45 million judgment.[1] Resp. Op. at 4; *Pinion* v. *Dow Chem., U.S.A.*, 928 F.2d 1522, 1537-38 (11th Cir. 1991) (Johnson, J., dissenting). Instead, Respondents misrepresent the facts in *Wolfsohn* to claim no conflict with the decision below, pretend the circuits are in harmony despite more than fifty-seven "unique circumstances" opinions over the last decade,[2]

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[1] Of the judgment, $2 million consists of punitive damages challenged on the merits by Petitioner before the Eleventh Circuit.

[2] *See* Appendix listing by circuit all "unique circumstances" cases since 1981 found by our Lexis search.

and argue that the "unique circumstances" doctrine of *Wolfsohn* must give way to the "mandatory jurisdictional" provisions of the Federal Rules. Resp. Op. at 5. Each of Respondents' points is treated below.

1. *Wolfsohn is on "all-fours" with this case.* Respondents claim that *Wolfsohn* is distinguishable from the instant case because "the *petitioner* . . . *filed* a motion to extend the time" for post-trial motions due to the fact that "[h]er counsel was hospitalized at the time, recovering from an illness involving surgery." Resp. Op. at 6 (emphasis added). In fact, as the certiorari petition and opposition in *Wolfsohn* show, petitioner's counsel—not petitioner—prepared her time extension notice; moreover, her counsel was not "disabled" from filing either that motion or the subsequent motion for rehearing on the merits.[3] Neither this Court nor any circuit after *Wolfsohn* has ever once mentioned counsel's illness in discussing the "unique circumstances" that warranted allowing Wolfsohn's technically untimely appeal.

2. *Respondents all but admit a conflict among the circuits.* Under a heading claiming that there "is no *substantial* conflict," Respondents acknowledge that there are "varying verbal formulations" of the "unique circumstances" doctrine but that these are not "sufficient" to warrant certiorari. Resp. Op. at 7 (emphasis added). In fact, what Respondents call "varying verbal formulations" are different, outcome-determinative rules.

Fairley v. *Jones*, 824 F.2d 440 (5th Cir. 1987), for example, applied the doctrine to allow an appeal on facts identical to those here. To be sure, appellant was *pro se* but the critical factor for the Fifth Circuit was that Ms. Fairley, like Ms. Wolfsohn and Petitioner here, "sought the extension within the ten-day limit for filing a motion for new trial." *Id.* at 443. Likewise, *Aviation Enters., Inc.* v. *Orr*, 716 F.2d 1403, 1406 n.25 (D.C. Cir. 1983), applied the "unique circumstances" doctrine, not in dic-

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[3] *Wolfsohn* Cert. Pet. at 4; *Wolfsohn* Cert. Op. at 6-7.

tum, but as an alternative holding that permitted the court to avoid deciding which of two orders triggered the right to appeal. Nor do Respondents even attempt to distinguish *Webb* v. *Department of Health and Human Servs.*, 696 F.2d 101, 106 (D.C. Cir. 1982), which applied the "unique circumstances" doctrine despite the fact that "Webb did not rely on an express statement by the district court" that his subsequent appeal would be timely.

3. *Respondents' argument for avoiding plenary review here depends upon replacing the "unique circumstances" doctrine with a "mandatory jurisdictional" rule.* Like many of the circuit opinions, Respondents claim to accept *Wolfsohn's* continued vitality while actually arguing that strict compliance with the ten-day requirement for post-trial motions is "a mandatory jurisdictional act." Resp. Op. at 5. Respondents' jurisdictional characterization puts the issue exactly backwards. This Court in *Wolfsohn* allowed an exception to the time extension preclusion of Fed. R. Civ. P. 6(b) precisely because the Federal Rules, like this Court's own rules, "are *not jurisdictional* and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Schacht* v. *United States*, 398 U.S. 58, 64 (1970) (emphasis added).

The mistaken view that the time extension preclusion in Fed. R. Civ. P. 6(b) is jurisdictional underlies the *de facto* overruling by several circuits of this Court's "unique circumstances" trilogy. *See* Cert. Pet. at 10-11. Those courts rely heavily on cases like *Browder* v. *Director, Dep't of Corrections of Ill.*, 434 U.S. 257, 264 (1978), which depend upon the statutory 30-day limit for appeal, rather than on the non-statutory, court-made procedural rules that are the subject of the "unique circumstances" doctrine.[4] Just as the statutory limit in *Browder* was set

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[4] *But cf. Needham* v. *White Laboratories, Inc.*, 454 U.S. 927 (1981) (Rehnquist, J., dissenting from denial of certiorari in "unique circumstances" case on the ground that *Browder* applies to time limits in rules promulgated by the Judicial Branch).

by Congress and can only be changed by Congress, so too the "unique circumstances" rule in *Wolfsohn* was established by this Court and can only be changed by this Court. *Houston* v. *Lack*, 487 U.S. 266 (1988). *See also* Scalia, J., dissenting, 487 U.S. at 284 (noting the same result might be achieved by an amendment of the rules).

CONCLUSION

This case is identical to *Wolfsohn* and accordingly should be summarily reversed. The "unique circumstances" doctrine upon which *Wolfsohn* is based has spawned at least fifty-seven circuit decisions over the past decade, some following *Wolfsohn* but others purporting to modify this Court's test because of inapposite decisions interpreting statutory time limits for appeal. Unless summarily reversed, the Court should grant certiorari here to decide the application of truly "jurisdictional" decisions like *Browder* to this Court's authority in "unique circumstances" to relax time limits in the Federal Rules.

Respectfully submitted,

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Dated: November 1, 1991

APPENDIX

District of Columbia Circuit

Kropinski v. *World Plan Executive Council—US*, 853 F.2d 948 (D.C. Cir. 1988).

Center For Nuclear Responsibility, Inc. v. *United States Nuclear Regulatory Commission*, 781 F.2d 935 (D.C. Cir. 1986).

Ashby Enterprises, Ltd. v. *Weitzman, Dym & Associates*, 780 F.2d 1043 (D.C. Cir. 1986).

Aviation Enters., Inc. v. *Orr*, 716 F.2d 1403 (D.C. Cir. 1983).

Webb v. *Dep't of Health and Human Servs.*, 696 F.2d 101 (D.C. Cir. 1982).

Second Circuit

Long Island Radio Co. v. *National Labor Relations Board*, 841 F.2d 474 (2d Cir. 1988).

Third Circuit

Transcontinental Leasing, Inc. v. *Michigan National Bank Detroit*, Nos. 90-1223, 90-1224, 90-1247 (3d Cir. September 5, 1991).

Kraus v. *Consolidated Rail Corp.*, 899 F.2d 1360 (3d Cir. 1990).

United States v. *Huebel*, 864 F.2d 1104 (3d Cir. 1989).

Smith v. *Evans*, 853 F.2d 155 (3d Cir. 1988).

Grandison v. *Moore*, 786 F.2d 146 (3d Cir. 1986).

Fuente v. *Central Electric Cooperative, Inc.*, 703 F.2d 63 (3d Cir. 1983).

Fourth Circuit

Jones v. *AT&T Technologies, Inc.*, No. 90-2921 (4th Cir. August 30, 1991).

Fifth Circuit

Allied Steel v. *City Of Abilene*, 909 F.2d 139 (5th Cir. 1990).

Mann v. *Director, Texas Department of Corrections*, 840 F.2d 1194 (5th Cir. 1988).

Fairley v. *Jones*, 824 F.2d 440 (5th Cir. 1987).

Equal Employment Opportunity Commission v. *Southern Pacific Transportation Company*, 799 F.2d 1076 (5th Cir. 1986).

Curacao Drydock Co. v. *The M/V Akritas*, 710 F.2d 204 (5th Cir. 1983).

Alvestad v. *Monsanto Co.*, 671 F.2d 908 (5th Cir. 1982).

Sixth Circuit

Ageel v. *Seiter*, 826 F.2d 1062 (6th Cir. 1987).

Kentucky Association Of Electric Cooperatives, Inc. v. *Local Union No. 369, International Brotherhood of Electrical Workers, AFL-CIO*, 780 F.2d 1021 (6th Cir. 1985).

Baker v. *Chagrin Valley Medical Corp.*, 779 F.2d 49 (6th Cir. 1985).

Seventh Circuit

United States v. *Dumont*, 936 F.2d 292 (7th Cir. 1991).

Varhol v. *National Railroad Passenger Corporation*, 909 F.2d 1557 (7th Cir. 1990).

Woodall v. *The Drake Hotel, Inc.*, 892 F.2d 625 (7th Cir. 1989).

Green v. *Bisby*, 869 F.2d 1070 (7th Cir. 1989).

Parke-Chapley Construction Co. v. *Cherrington*, 865 F.2d 907 (7th Cir. 1989).

Reinsurance Company of America, Inc. v. *Administratia Asigurarilor de Stat*, 808 F.2d 1249 (7th Cir. 1987).

Sonicraft, Inc. v. *N.L.R.B.*, 814 F.2d 385 (7th Cir. 1987).

Labuguen v. *Carlin*, 792 F.2d 708 (7th Cir. 1986).

Mayer v. *Angelica*, 790 F.2d 1315 (7th Cir. 1986).

Bailey v. Sharp, 782 F.2d 1366 (7th Cir. 1986).

Wort v. *Vierling*, 778 F.2d 1233 (7th Cir. 1985).

Marane, Inc. v. *McDonald's Corp.*, 755 F.2d 106 (7th Cir. 1984).

Parisie v. *Greer*, 705 F.2d 882 (7th Cir. 1983).

Needham v. *White Laboratories, Inc.*, 639 F.2d 394 (7th Cir.) *cert. denied*, 454 U.S. 927 (1981).

Eighth Circuit

Hable v. *Pairolero*, 915 F.2d 394 (8th Cir. 1990).

Insurance Company of North America v. *Bay*, 784 F.2d 869 (8th Cir. 1986).

Ninth Circuit

Shurance v. *Planning Control International, Inc.*, No. 89-55887 (9th Cir. Jan. 8, 1991).

In re Slimick, 928 F.2d 304 (9th Cir. 1990).

In re Frederick, 115 Bankr. 661 (9th Cir. Bankr. Panel 1990).

United States v. *Aguilar*, 883 F.2d 662 (9th Cir. 1989).

Barry v. *Bowen*, 825 F.2d 1324 (9th Cir. 1987).

In re Provan, 74 Bankr. 717 (9th Cir. Bankr. Panel 1987).

Alaska Limestone Corp. v. *Hodel*, 799 F.2d 1409 (9th Cir. 1986).

Fiester v. *Turner*, 783 F.2d 1474 (9th Cir. 1986).

United Artists Corp. v. *La Cage Aux Folles, Inc.*, 771 F.2d 1265 (9th Cir. 1985).

People of the State of California v. *Tahoe Regional Planning Agency*, 766 F.2d 1316 (9th Cir. 1985).

National Industries, Inc. v. *Republic National Life Insurance Co.*, 677 F.2d 1258 (9th Cir. 1982).

Donnell v. *Commissioner of Internal Revenue Service*, 639 F.2d 535 (9th Cir. 1981).

Tenth Circuit

Certain Underwriters at Lloyds of London v. *Evans*, 896 F.2d 1255 (10th Cir. 1990).

Stauber v. *Kieser*, 810 F.2d 1 (10th Cir. 1982).

Eleventh Circuit

Pinion v. *Dow Chemical, U.S.A.*, 928 F.2d 1522 (11th Cir. 1991).

Butler v. *Coral Volkswagen, Inc.*, 804 F.2d 612 (11th Cir. 1986).

Inglese v. *Warden, U.S. Penitentiary*, 687 F.2d 362 (11th Cir. 1982).

Other

United States v. *Beacon Bay Enterprises, Inc.*, 840 F.2d 921 (Temp. Emer. Ct. App. 1988).

Sofarelli Associates, Inc. v. *United States*, 716 F.2d 1395 (Fed. Cir. 1983).